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Fourteenth report on reservations to treaties

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I. Introduction

1. The eleventh report on reservations to treaties (A/CN.4/574), submitted at the fifty-eighth session of the Commission, contained a brief summary of the work of the Commission on the subject (paras. 1-43). In a continuation of this tradition, deemed helpful by the members of the Commission, this year's report summarizes briefly the lessons to be drawn from the completion of the consideration of the tenth report in 2006, and from the consideration of the eleventh, twelfth and thirteenth reports in 2007 and 2008 by the Commission and by the Sixth Committee of the General Assembly. These last three reports constitute a single text, all three of them relating to the procedure for the formulation of reactions to reservations (acceptance and objection) and to interpretative declarations (approval, opposition, reclassification and silence).[1] This summary is supplemented by a presentation of the main developments concerning reservations that have occurred in recent years and have come to the attention of the Special Rapporteur.

A. Tenth report on reservations to treaties and the outcome

1. Completion of consideration of the tenth report by the Commission

2. At its fifty-eighth session the Commission completed its consideration of the second part of the tenth report on reservations to treaties[2] which, owing to a lack of time, had not been discussed in depth at the preceding session.[3] This part of the tenth report, devoted entirely to the question of the validity of reservations, related to the concept of the object and purpose of the treaty, competence to assess the validity of reservations and the consequences of the invalidity of a reservation. The Commission also had before it a note by the Special Rapporteur on draft guideline 3.1.5 (Definition of the object and purpose of the treaty)[4] in which he proposed two alternative formulations, taking into account the preliminary discussion that had taken place at the fifty-seventh session (2005).[5]

3. The discussion of the definition of the object and purpose of a treaty was fruitful and productive.[6] The idea of formulating a definition was favourably received, although the wording gave rise to questions and doubts. Nevertheless, the Commission and the Special Rapporteur considered that the three alternative versions of draft guideline 3.1.5 served as a basis for a definition, bearing in mind the element of subjectivity inherent in the concept.

4. Draft guidelines 3.1.7 to 3.1.13, which provide specific examples of reservations that are incompatible with the object and purpose of the treaty, generally met with support among the members of the Commission and the pragmatic approach they represented was deemed judicious.

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[1] See the thirteenth report on reservations to treaties (A/CN.4/600), para. 282.

[2] A/CN.4/558/Add.1 and Corr.1 and 2 and Add.2.

[3] See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 143, para. 345. See also the eleventh report on reservations to treaties (A/CN.4/574), para. 28.

[4] A/CN.4/572 and Corr.1.

[5] See A/CN.4/SR.2856, pp. 8-27, A/CN.4/SR.2857, pp. 15-18 and A/CN.4/SR.2858, pp. 1-31.

[6] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 144.

5. The Commission welcomed draft guidelines 3.2 and 3.2.1 to 3.2.4, on competence to assess the validity of reservations, including that of dispute settlement bodies and treaty monitoring bodies.[7]

6. With regard to the effects of the invalidity of a reservation, the Commission referred draft guidelines 3.3 and 3.3.1 to the Drafting Committee, indicating that there was no reason to distinguish between the different types of invalidity in article 19 of the Vienna Conventions and that invalidity applied only within the restricted context of treaty law and did not involve engaging the international responsibility of its author. However, the Commission preferred to defer its consideration of draft guidelines 3.3.2 to 3.3.4 pending its consideration of the effect of reservations, objections to reservations and acceptances of reservations.[8] The Special Rapporteur supported this position.[9]

7. The Commission decided to refer draft guidelines 3.3.5 to 3.1.13, 3.2, 3.2.1 to 3.2.4, 3.3 and 3.3.1 to the Drafting Committee.[10]

8. In addition, the Commission adopted seven draft guidelines[11] and their commentaries which had been referred to the Drafting Committee at the preceding session.[12]

2. Consideration of chapter VIII of the 2006 report of the Commission by the Sixth Committee

9. Chapter VIII of the Commission's report on the work of its fifty-eighth session[13] deals with reservations to treaties. As is customary, a very brief summary of it is given in chapter II[14] and the "specific issues on which comments would be of particular interest to the Commission" are set out in Chapter III. In the perspective of the meeting it was planning to have with experts in the field of human rights in order to hold a discussion on issues relating to reservations, the Commission wished to know the views of Governments are necessary or useful adjustments to the "Preliminary conclusions" of 1997.[15]

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[7] Ibid., paras. 130-136 and 153-155.

[8] Ibid., para. 139.

[9] Ibid., para. 157.

[10] Ibid., para. 103.

[11] Draft guidelines 3.1 (Permissible reservations), 3.1.1 (Reservations expressly prohibited by the treaty), 3.1.2 (Definition of specified reservations), 3.1.3 (Permissibility of reservations not prohibited by the treaty) and 3.1.4 (Permissibility of specified reservations). In addition, the Commission provisionally adopted draft guidelines 1.6 (Scope of definitions) and 2.1.8 [2.1.7 bis] (Procedure in case of manifestly invalid reservations). For the text and commentary on these draft guidelines, see *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 324-361, para. 159.

[12] Ibid., *Sixtieth Session, Supplement No. 10* (A/60/10), p. 143, para. 345. See also the eleventh report on reservations to treaties (A/CN.4/574), para. 30.

[13] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), paras. 92-159.

[14] Ibid., para. 17.

[15] Ibid., para. 29. For the preliminary conclusions, see *Yearbook of the International Law Commission*, 1997, Vol. II, second part, p. 57, para. 157.

10. The idea of exchanging views with human rights experts, including the monitoring bodies, met with wide support in the Sixth Committee.[16] It was maintained that the establishment of a special regime relating to reservations to human rights treaties was not desirable.[17] Other delegations wished the preliminary conclusions to be reviewed by the Commission, particularly with respect to the role, functions and powers of the monitoring bodies. In the view of some delegations, views consistently expressed by those bodies regarding the validity of a certain category of reservations could become authoritative.[18]

11. On the whole, the work of the Special Rapporteur was favourably received.[19] However, in one view the work of the Commission and its Special Rapporteur was too far advanced in relation to the actual practice followed by States, and could lead to amendment of the Vienna Conventions.[20]

12. A number of delegations felt that the question of reservations incompatible with the object and purpose of a treaty was the most important aspect of the topic.[21] Nevertheless, it was maintained that the proposed definition, which was too loose, would hardly contribute to clarifying the definition of that concept.[22] According to another view, definition of the object and purpose of a treaty was necessary,[23] but must be sufficiently broad that it could be applicable on a case-by-case basis in accordance with the rules of treaty interpretation.[24] Few delegations commented on draft guidelines 3.1.7 to 3.1.13 designed to provide more specific examples of reservations incompatible with the object and purpose of a treaty.[25]

13. Regarding the draft guidelines on competence to assess the validity of reservations, some delegations pointed out that although their overall approach was commendable,[26] they lacked consistency.[27] It was recalled that the competence of monitoring bodies could stem only from the functions assigned to them in the treaty that itself established them.[28] Some States expressed doubts as to the competence of monitoring bodies, in that respect, and asserted that it was not their task to assess

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[16] Sweden (A/C.6/61/SR.16, para. 44) Austria (ibid., para. 48); Netherlands (ibid., para. 57); Portugal (ibid., para. 83); Japan (ibid., para. 87); Chile (A/C.6/61/SR.19, para. 6); New Zealand (ibid., para. 11). See, however, United Kingdom (A/C.6/61/SR.16, para. 91).

[17] Sweden (A/C.6/61/SR.16, para. 46); Belgium (ibid., para. 69); Romania (A/C.6/61/SR.19, para. 61).

[18] Netherlands (A/C.6/61/SR.16, para. 57). See, however, Canada (ibid., para. 58).

[19] Japan (A/C.6/61/SR.16, para. 86); Germany (ibid., para. 88); Russian Federation (A/C.6/61/SR.18, para. 72); New Zealand (A/C.6/61/SR.19, para. 11).

[20] Portugal (A/C.6/61/SR.16, paras. 76 and 78).

[21] Sweden (A/C.6/61/SR.16, para. 42).

[22] Sweden (A/C.6/61/SR.16, para. 42); Netherlands (ibid., para. 55); United Kingdom (ibid., para. 92); Israel (A/C.6/61/SR.17, para. 16).

[23] Spain (A/C.6/61/SR.16, para. 73).

[24] Mexico (A/C.6/61/SR.16, para. 47).

[25] See for example United Kingdom (A/C.6/61/SR.16, para. 92).

[26] Spain (A/C.6/61/SR.16, para. 74); Romania (A/C.6/61/SR.19, para. 61).

[27] Austria (A/C.6/61/SR.16, paras. 51-53); Spain (ibid., para. 74); Israel (A/C.6/61/SR.17, para. 20).

[28] France (A/C.6/61/SR.17, para. 2); United States of America (ibid., para. 8); Israel (ibid., paras. 17-19). Although the Special Rapporteur does not wish to start an argument with the States which held this view, he does wish to state as clearly as possible that they are implicitly attributing to him intentions he did not have and that he never claimed that the competence of those bodies with respect to reservations could be based on a legal foundation other than the treaty establishing them (see tenth report on reservations to treaties, A/CN.4/558/Add.2, paras. 169-171; second report on reservations to treaties, A/CN.4/477/Add.1, paras. 209 and 234; and *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 111).

the validity of reservations.[29] In one view, only the States parties concerned possessed such competence.[30] Greater caution was also urged with regard to the functions of the depositary and its role with respect to manifestly invalid reservations,[31] particularly because of the vagueness of the concept of object and purpose of a treaty.

14. With regard to the consequences of the non-validity of a reservation, it was said that this was an issue central to the study.[32] According to some delegations, such reservations must be regarded as null and void,[33] but the view was expressed that the specific consequences of that nullity should be specified.[34] Doubts were expressed regarding the desirability of draft guideline 3.3.4 regarding the unanimous acceptance of an invalid reservation.[35]

B. Eleventh and twelfth reports on reservations to treaties and the outcome

1. Consideration of the eleventh and twelfth reports by the Commission

15. The eleventh report on reservations to treaties had been submitted at the fifty-eighth session, but the Commission decided to consider it at its fifty-ninth session, owing to a lack of time.[36] Therefore in 2007, the Commission had before it the eleventh report on reservations to treaties which "in fact constitutes the second part of the eleventh report (A/CN.4/574), from which it carries on".[37]

16. The majority of the draft guidelines relating to the formulation of objections and the withdrawal and modification of objections proposed in the eleventh report were approved without objection by the Commission.[38]

17. However, there were major divergences of views among members of the Commission as to the author of an objection (draft guideline 2.6.5), including as to whether any State or international organization that was entitled to become a party to the treaty might also formulate an objection to a reservation. The view was expressed that such States and international organizations did not have the same rights as contracting States and contracting international organizations and might therefore not formulate objections in the strict sense of the term. Therefore, the statements formulated by States and international organizations which were only

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[29] China (A/C.6/61/SR.16, para. 63). See also Russian Federation (A/C.6/61/SR.18, para. 73) or Australia (A/C.6/61/SR.19, para. 17).

[30] Ethiopia (A/C.6/61/SR.14, para. 94).

[31] Ethiopia (ibid.); Canada (A/C.6/61/SR.16, para. 60); Spain (ibid., para. 72); United Kingdom (ibid., para. 93); South Africa (ibid., para. 96); France (A/C.6/61/SR.17, para. 1); Poland (ibid., para. 13); Russian Federation (A/C.6/61/SR.18, para. 72); Australia (A/C.6/61/SR.19, para. 17). See also China (A/C.6/61/SR.16, para. 64).

[32] France (A/C.6/61/SR.17, para. 5).

[33] Sweden (A/C.6/61/SR.16, para. 43); Austria (ibid., para. 51); France (A/C.6/61/SR.17, para. 7). See, however, China (A/C.6/61/SR.16, paras. 65-67).

[34] Canada (A/C.6/61/SR.16, para. 59).

[35] Portugal (A/C.6/61/SR.16, para. 79) and Austria (A/C.6/61/SR.16, para. 54).

[36] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 43.

[37] Twelfth report on reservations to treaties, A/CN.4/584.

[38] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), paras. 102-105.

entitled to become parties to the treaty, should not be referred to as objections. According to that view, to provide for such a possibility would create a practical problem for, where an open treaty was concerned, the parties thereto might not have been aware of some objections.

18. However, according to the majority opinion, the provisions of article 20, paragraphs 4 (b) and 5, of the Vienna Conventions not only in no way excluded, but indeed implied, the entitlement of States and international organizations that were entitled to become parties to the treaty to formulate objections. Article 21, paragraph 3, of the Vienna Conventions on the effects of objections on the application of the treaty in cases where the author of the objection had not opposed the entry into force of the treaty between itself and the reserving State provided for no limitation on the potential authors of an objection. Furthermore, as article 23, paragraph 1, of the 1986 Convention clearly states, reservations, express acceptances of and objections to reservations must be communicated not only to the contracting States and contracting organizations but also to "other States and international organizations entitled to become parties to the treaty". Such notification had meaning only if those other States and other international organizations could, in fact, react to the reservation by way of an express acceptance or an objection. In the opinion of the Commission, that approach alone was consistent with the letter and spirit of draft guideline 2.6.1, which defined objections to reservations not on the basis of their legal effects but according to the effects *intended* by the objecting States or international organizations.

19. Concerns were also expressed as to whether pre-emptive or late objections could be formulated (draft guidelines 2.6.14 and 2.6.15). The view was expressed that such objections did not have the effects of an objection per se. Therefore, such phenomena, which did occur in State practice, should be referred to differently.

20. The draft guidelines on procedure did not raise any concerns and were widely endorsed by members of the Commission.[39] In particular, the introduction of a guideline on the statement of reasons for objections and the suggestion by the Special Rapporteur that a similar draft guideline should be proposed on the reasons for reservations[40] were welcomed.

21. Few concerns were raised with respect to the draft guidelines concerning acceptance of reservations. Such concerns were often of an editorial nature or related to the translation of the draft guidelines into languages other than French.[41]

22. The Commission decided to refer draft guidelines 2.6.3 to 2.6.6, 2.6.7 to 2.6.15, 2.7.1 to 2.7.9, 2.8 and 2.8.1 to 2.8.12 to the Drafting Committee, and to review the wording of draft guideline 2.1.6.[42]

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[39] Ibid.

[40] See note by the Special Rapporteur on draft guideline 2.1.9, "Statement of reasons for reservations", A/CN.4/586.

[41] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 141.

[42] Ibid., para. 45.

23. The Commission also adopted nine draft guidelines[43] that had been referred to the Drafting Committee in 2006[44] together with commentaries thereto.[45]

24. Pursuant to General Assembly resolution 61/34 of 4 December 2006, the Commission convened a meeting with representatives of United Nations human rights treaty bodies. The meeting took place on 15 and 16 May 2007. The following bodies were represented: the Committee on Economic, Social and Cultural Rights; the Human Rights Committee; the Committee against Torture; the Committee on the Rights of the Child; the Committee on the Elimination of Racial Discrimination; the Committee on the Elimination of Discrimination against Women; the Committee on Migrant Workers; the Council of Europe (European Court of Human Rights and the Committee of Legal Advisers on Public International Law (CAHDI)); and the Subcommission on the Promotion and Protection of Human Rights. The meeting provided an opportunity for a fruitful exchange of views that was welcomed by all participants.[46] There was consensus among representatives of human rights treaty bodies and some members of the Commission on the lack of a special regime applicable to reservations to human rights treaties which, like all other treaties, continued to be governed by the Vienna Conventions on the law of treaties and by individual norms and rules provided for under a particular treaty. However, there might arise under human rights treaties specific issues calling for specific solutions, such as whether treaty monitoring bodies had the power to rule on reservations formulated by States parties.

2. Consideration of chapter IV of the 2007 report of the Commission by the Sixth Committee

25. Chapter IV of the Commission's report on the work of its fifty-ninth session[47] deals with the topic of reservations to treaties. As is customary, a very brief summary is given in chapter II[48] and "specific issues on which comments would be of particular interest to the Commission" are set out in chapter III. In 2007, the Commission posed the following four questions on the invalidity of reservations and the effects thereof:

> "(a) What conclusions do States draw if a reservation is found to be invalid for any of the reasons listed in article 19 of the 1969 and 1986 Vienna Conventions? Do they consider that the State formulating the reservation is still bound by the treaty without being able to enjoy the benefit of the reservation? Or, conversely, do they believe that the acceptance of the

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[43] Draft guidelines 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty), 3.1.6 (Determination of the object and purpose of the treaty), 3.1.7 (Vague or general reservations), 3.1.8 (Reservations to a provision reflecting a customary norm), 3.1.9 (Reservations contrary to a rule of *jus cogens*), 3.1.10 (Reservations to provisions relating to non-derogable rights), 3.1.11 (Reservations relating to internal law), 3.1.12 (Reservations to general human rights treaties) and 3.1.13 (Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty).

[44] See para. 7 above.

[45] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 154.

[46] For a more detailed account of this meeting, see the annex to the present report.

[47] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), paras. 34-154.

[48] Ibid., para. 13.

reserving State is flawed and that that State cannot be considered to be bound by the treaty? Or do they favour a compromise solution and, if so, what is it?

"(b) Are the replies to the preceding questions based on a position of principle or are they based on practical considerations? Do they (or should they) vary according to whether the State has or has not formulated an objection to the reservation in question?

"(c) Do the replies to the above two sets of questions vary (or should they vary) according to the type of treaty concerned (bilateral or normative, human rights, environmental protection, codification, etc.)?

"(d) More specifically, State practice offers examples of objections that are intended to produce effects different from those provided for in article 21, paragraph 3 (objection with minimum effect), or article 20, paragraph 4 (b) (maximum effect), of the Vienna Conventions, either because the objecting State wishes to exclude from its treaty relations with the reserving State provisions that are not related to the reservation (intermediate effect), or because it wishes to render the reservation ineffective and considers the reserving State to be bound by the treaty as a whole and that the reservation thus has no effect ("super-maximum" effect). The Commission would welcome the views of States regarding these practices (irrespective of their own practice)."[49]

26. Some States replied in writing to these questions[50] while others responded to them in greater[51] or less[52] detail during the debates of the Sixth Committee.

27. Delegations reiterated their support for the work of the Commission and for its Special Rapporteur[53] although some expressed concern that the draft guidelines and the commentaries thereto[54] were too complex.

28. The difficulty of defining the object and purpose of a treaty was stressed once again.[55] Some States generally endorsed the Commission's approach, as reflected in draft guidelines 3.1.5 and 3.1.6[56] and in the draft guidelines intended to provide

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[49] Ibid., para. 23

[50] The Czech Republic, Mauritius and South Africa.

[51] Germany (A/C.6/62/SR.19, paras. 21-27); Sweden (A/C.6/62/SR.22, paras. 27-30); France (A/C.6/62/SR.23, paras. 64-67); Romania (A/C.6/62/SR.24, paras. 16 and 17); Japan (ibid., paras. 88-90); Belgium (A/C.6/62/SR.25, paras. 20-22); Greece (ibid., paras. 28 and 29).

[52] India (A/C.6/62/SR.22, para. 37); Austria (ibid., para. 50); Egypt (ibid., para. 66); Hungary (A/C.6/62/SR.23, para. 38); Belarus (ibid., para. 43).

[53] Canada (A/C.6/62/SR.19, para. 53); Sweden (A/C.6/62/SR.22, para. 27); India (ibid., para. 37); Germany (ibid., paras. 78 and 79); Hungary (A/C.6/62/SR.23, para. 37); Czech Republic (ibid., para. 52); Cuba (ibid., para. 72); New Zealand (A/C.6/62/SR.25, para. 11).

[54] Italy (A/C.6/62/SR.22, para. 85); Hungary (A/C.6/62/SR.23, para. 37); Poland (A/C.6/62/SR.26, para. 17).

[55] Austria (A/C.6/62/SR.22, para. 40). See also United Kingdom (A/C.6/62/SR.24, para. 56) and New Zealand (A/C.6/62/SR.25, para. 11).

[56] Austria (A/C.6/62/SR.22, paras. 40 and 41); Belarus (A/C.6/62/SR.23, para. 46); Cuba (A/C.6/62/SR.24, para. 72); New Zealand (A/C.6/62/SR.25, para. 11); Slovakia (A/C.6/62/SR.26, para. 15). See, however, United States of America (A/C.6/62/SR.22, para. 87); United Kingdom (A/C.6/62/SR.24, paras. 57-59); Republic of Korea (A/C.6/62/SR.26, para. 2).

examples of the types of reservations that were incompatible with the object and purpose of the treaty,[57] despite some of the criticisms and suggestions made.[58]

29. The draft guidelines on objections and the formulation of objections were welcomed by the delegations which spoke on that issue. It was also stated that, while a State might raise an objection for any reason whatsoever,[59] such reason must be in conformity with international law.[60]

30. Concerning draft guideline 2.6.5 ("Author of an objection"), several delegations were of the view that the phrase "any State and any international organization that is entitled to become a party to the treaty" referred to signatory States and international organizations, since a State or international organization that had no intention of becoming a party to a treaty should not have the right to object to a reservation made by a State party.[61] It was also argued that such objections should be subsequently confirmed because of the considerable time which would have elapsed between when the objection was formulated and when the author of the objection expressed its consent to be bound by the treaty.[62]

31. The draft guidelines on the formulation of reservations were endorsed.[63] It was pointed out, however, that the provision for written form should also take account of modern means of communication.[64] Draft guideline 3.1.10 recommending that reservations should be justified[65] was also endorsed. Support was also expressed for the suggestion that a similar draft guideline should be elaborated for reservations, since a statement of reasons for reservations and objections to reservations promoted dialogue between the parties directly concerned.[66] However, some delegations found pre-emptive objections unacceptable.[67]

32. The Commission's general approach to late objections (draft guideline 2.6.15) was endorsed,[68] although it was suggested that late objections could be equated with

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[57] Italy (A/C.6/62/SR.22, para. 86); Slovakia (A/C.6/62/SR.26, para. 16).

[58] Austria (A/C.6/62/SR.22, paras. 40-42); China (ibid., para. 60); Belarus (A/C.6/62/SR.23, paras. 47-50); Australia (A/C.6/62/SR.25, para. 9).

[59] Argentina (A/C.6/62/SR.22, para. 56); Malaysia (A/C.6/62/SR.23, para. 1); Slovakia (A/C.6/62/SR.26, para. 13). See, however, Egypt (A/C.6/62/SR.22, para. 66).

[60] Argentina (A/C.6/62/SR.22, para. 56); China (A/C.6/62/SR.22, para. 60); Islamic Republic of Iran (A/C.6/62/SR.25, para. 41).

[61] Malaysia (A/C.6/62/SR.23, para. 2); Canada (ibid., para. 15); Russian Federation (A/C.6/62/SR.24, paras. 57 and 58); Portugal (ibid., para. 101); Greece (A/C.6/62/SR.25, para. 31); Islamic Republic of Iran (ibid., para. 42). See, however, Mexico (A/C.6/62/SR.24, para. 12).

[62] Malaysia (A/C.6/62/SR.23, para. 2); Greece (A/C.6/62/SR.25, para. 12).

[63] Mexico (A/C.6/62/SR.24, para. 12).

[64] Belarus (A/C.6/62/SR.23, para. 45).

[65] Argentina (A/C.6/62/SR.22, para. 56); Czech Republic (A/C.6/62/SR.23, para. 52); Democratic Republic of the Congo (A/C.6/62/SR.24, para. 26); Portugal (ibid., para. 101). See also Mexico (A/C.6/62/SR.24, para. 14); New Zealand (A/C.6/62/SR.25, para. 13).

[66] Argentina (A/C.6/62/SR.22, para. 56). For the action taken on this proposal, see paras. 34 and 35 below.

[67] Malaysia (A/C.6/62/SR.23, para. 4). See also Czech Republic (A/C.6/62/SR.23, para. 54); France (ibid., para. 61); Portugal (A/C.6/62/SR.24, para. 101); Greece (A/C.6/62/SR.25, para. 31); Islamic Republic of Iran (ibid., para. 43). For an opposing view, see Slovakia (A/C.6/62/SR.26, para. 14).

[68] Mexico (A/C.6/62/SR.24, para. 15).

simple interpretative declarations.[69] It was suggested that the legal effects, if any, of late objections should be further clarified.[70]

33. Few comments were made on the draft guidelines on acceptance. In general, delegations expressed support for them. However, several delegations were of the view that the distinction between tacit acceptance and implicit acceptance was superfluous and should be deleted.[71] There was support for the view that acceptance was irreversible.[72]

C. Thirteenth report on reservations to treaties and the outcome

1. Consideration of the thirteenth report by the Commission

34. At its sixtieth session, the Commission had before it the thirteenth report on reservations to treaties,[73] which was devoted entirely to the subject of interpretative declarations. The Commission also considered the note by the Special Rapporteur on the statement of reasons for reservations,[74] which had been submitted in 2007 but had not been discussed owing to lack of time.

35. The Special Rapporteur's proposal to include, in the Guide to Practice, a guideline on the statement of reasons for reservations was received positively by the members of the Commission. Draft guideline 2.1.9 was referred to the Drafting Committee, and later was provisionally adopted.

36. There was no major opposition to the Special Rapporteur's thirteenth report. The majority of Commission members approved the various categories of reactions to interpretative declarations and the terminology proposed by the Special Rapporteur.[75] The Commission also agreed that it would be useful to include, in the Guide to Practice, guidelines on the formulation of, reasons for and communication of responses to interpretative declarations.

37. Generally speaking, the most vexatious problem was that of silence as a response to an interpretative declaration, as addressed in draft guidelines 2.9.8[76] and

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[69] Czech Republic (A/C.6/62/SR.23, para. 53).

[70] France (A/C.6/62/SR.23, para. 61); Portugal (A/C.6/62/SR.24, para. 101); Australia (A/C.6/62/SR.25, para. 9).

[71] Argentina (A/C.6/62/SR.22, para. 56); France (A/C.6/62/SR.23, para. 62).

[72] Argentina (A/C.6/62/SR.22, para. 56); El Salvador (A/C.6/62/SR.23, para. 33).

[73] A/CN.4/600.

[74] A/CN.4/586.

[75] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 94.

[76] Draft guideline 2.9.8 reads as follows:

> 2.9.8 *Non-presumption of approval or opposition*
>
> Neither approval of nor opposition to an interpretative declaration shall be presumed.

2.9.9.[77] While the majority of Commission members approved the language used in draft guideline 2.9.8, whereby silence is not to be interpreted as either approval of or opposition to an interpretative declaration, the wording of draft guideline 2.9.9, particularly paragraph 2, was challenged. In stating that "in certain specific circumstances", silence could be construed as consent to an interpretative declaration, the draft guideline is intended solely to allow greater flexibility in applying the principle of neutrality set out in draft guideline 2.9.8; nevertheless, a number of members expressed reservations regarding the validity of the expression "in certain specific circumstances", which they considered too general, and suggested providing specific examples of such circumstances.

38. With regard to draft guideline 2.9.10[78] on reactions to conditional interpretative declarations, members voiced doubts about the relevance of such a distinction, given that, according to a majority of Commission members, the legal regime of conditional interpretative declarations was indistinguishable from that of reservations.[79] Nevertheless, in line with the proposal of the Special Rapporteur — who shares that position a priori — it was decided that it would be premature to do away with the intermediate category of conditional interpretative declarations as the Commission had not yet considered the effects of such declarations.[80]

39. At its 2978th meeting, the Commission decided to refer all the draft guidelines proposed in the thirteenth report, that is, draft guidelines 2.9.1 (including the second paragraph of draft guideline 2.9.3) to 2.9.10, to the Drafting Committee, while emphasizing that draft guideline 2.9.10 was without prejudice to the subsequent retention or otherwise of the draft guidelines on conditional interpretative declarations.

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[77] Draft guideline 2.9.9 reads as follows:

2.9.9 *Silence in response to an interpretative declaration*

Consent to an interpretative declaration shall not be inferred from the mere silence of a State or an international organization in response to an interpretative declaration formulated by another State or another international organization in respect of a treaty.

In certain specific circumstances, however, a State or an international organization may be considered as having acquiesced to an interpretative declaration by reason of its silence or its conduct, as the case may be.

[78] Draft guideline 2.9.10 reads as follows:

2.9.10 *Reactions to conditional interpretative declarations*

Guidelines 2.6 to 2.8.12 shall apply to reactions of States and international organizations to conditional interpretative declarations.

[79] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 108.

[80] Ibid., paras. 109 and 110.

40. The Commission also provisionally adopted 23 draft guidelines and the commentaries thereto.[81] In addition, it took note of draft guidelines 2.8.1 to 2.8.12 as provisionally adopted by the Drafting Committee.[82]

2. Consideration of chapter VI of the 2008 report of the Commission by the Sixth Committee

41. Chapter VI of the Commission's report on the work of its sixtieth session[83] deals with reservations to treaties. As usual, a very brief summary is provided in chapter II[84] and the "specific issues on which comments would be of particular interest to the Commission" are dealt with in chapter III. The Commission asked several questions regarding the role of silence as a reaction to an interpretative declaration[85] as well as the potential effects of interpretative declarations.[86] The Secretariat has received written responses to the questions from Germany and Portugal.

42. Regarding the role of silence, the views expressed by the Sixth Committee supported the general approach of the Special Rapporteur appointed by the Commission. Several delegations argued that mere silence could not be considered as either approval of or opposition to an interpretative declaration and that, in theory, the consent of a State or international organization to an interpretative declaration should not be presumed.[87] The argument that silence can, in certain specific circumstances, be interpreted as consent was also approved.[88] Therefore, although it would seem that the principle has been accepted, the specific circumstances in which mere silence may be interpreted as acquiescence or consent have yet to be determined. Some members contended that it was not possible to

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[81] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), paras. 75, 76 and 78: draft guidelines 2.1.6 (Procedure for communication of reservations) (as amended), 2.1.9 (Statement of reasons [for reservations]), 2.6.5 (Author [of an objection]), 2.6.6 (Joint formulation [of objections to reservations]), 2.6.7 (Written form), 2.6.8 (Expression of intention to preclude the entry into force of the treaty), 2.6.9 (Procedure for the formulation of objections), 2.6.10 (Statement of reasons), 2.6.11 (Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation), 2.6.12 (Requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty), 2.6.13 (Time period for formulating an objection), 2.6.14 (Conditional objections), 2.6.15 (Late objections), 2.7.1 (Withdrawal of objections to reservations), 2.7.2 (Form of withdrawal of objections to reservations), 2.7.3 (Formulation and communication of the withdrawal of objections to reservations), 2.7.4 (Effect on reservation of withdrawal of an objection), 2.7.5 (Effective date of withdrawal of an objection), 2.7.6 (Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation), 2.7.7 (Partial withdrawal of an objection), 2.7.8 (Effect of a partial withdrawal of an objection) and 2.7.9 (Widening of the scope of an objection to a reservation) and 2.8 (Forms of acceptance of reservations).

[82] Ibid., para. 77.

[83] Ibid., paras. 67 to 124.

[84] Ibid., paras. 16 to 18.

[85] Ibid., para. 26.

[86] Ibid., paras. 27 and 28.

[87] France (A/C.6/63/SR.19, para. 19); Belarus (ibid., para. 51); Argentina (ibid., para. 74); Netherlands (A/C.6/63/SR.20, para. 9); Portugal (ibid., para. 21); New Zealand (A/C.6/63/SR.22, para. 7); Japan (A/C.6/63/SR.23, para. 45); Greece (A/C.6/63/SR.24, para. 2).

[88] Argentina (A/C.6/63/SR.19, para. 74); Qatar (A/C.6/63/SR.24, para. 77). See, however, China (A/C.6/63/SR.19, para. 67); Netherlands (A/C.6/63/SR.20, para. 9); Sweden (A/C.6/63/SR.19, para. 40); United Kingdom (A/C.6/63/SR.21, para. 18).

identify in the abstract those situations in which the silence of a State or international organization constituted acquiescence or consent to an interpretative declaration. Because an enumeration of such situations would be difficult and possibly futile, the circumstances of a State's reaction of silence should be examined on a case-by-case basis.[89] Another view was that the legal consequences of such silence should be assessed in the light of article 31, paragraph 3 (a), of the Vienna Convention; consequently, the general rules for entering into an agreement were sufficient to resolve the issue.[90] It was also agreed that silence had a legal effect in cases where a protest against the interpretation given in an interpretative declaration would be expected from the State or international organization directly concerned. The arbitral award in the *North Atlantic Coast Fisheries Case (Great Britain, United States)*[91] was cited as an example. It was further argued that silence on the part of a contracting party must be considered to play a role in the event of a dispute between that party and the author of the interpretative declaration.[92] Likewise, one delegation maintained that consent could be inferred from silence in the case of treaties the subject matter of which would require a prompt reaction to any interpretative declaration.[93]

43. The second question, which dealt with the legal effects of an interpretative declaration on its author and on a State or an international organization having approved or objected to the declaration, produced a wide range of reactions and positions. It was generally stressed that a distinction must be drawn between the legal effect of interpretative declarations and that of reservations, and that that distinction should be borne in mind when considering the question of reactions to declarations and to reservations and their respective effects.[94] It was stated that the general rules governing the interpretation of treaties were sufficient to establish the effects of an interpretative declaration and the reactions it may prompt. According to the same view, a reference to those customary rules could resolve the issue within the framework of the Guide to Practice[95] without prejudice to the flexibility of those rules or to the essential role played by the intention of the parties. Some delegations specifically referred to article 31, paragraph 3 (a), of the Vienna Convention.[96] According to another point of view, the consequences of an interpretative declaration should be considered in the light of the principle of estoppel.[97] Thus, the author of an interpretative declaration was bound by the interpretation expressed only if another contracting party came to rely on the declaration.[98] It was also suggested that interpretative declarations could act as an aid to interpretation.[99] As far as reactions of opposition were concerned, it was stressed that although they could limit the potential legal consequences of interpretative declarations, they

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[89] Spain (A/C.6/63/SR.22, para. 4). See, however, New Zealand (ibid., para. 7); Japan (A/C.6/63/SR.23, para. 45).

[90] Sweden (A/C.6/63/SR.19, para. 39); Germany (ibid., para. 80).

[91] Arbitral award of 7 September 1910, United Nations, vol. XI, pp. 173-226.

[92] France (A/C.6/63/SR.19, para. 19).

[93] Romania (A/C.6/63/SR.21, para. 55).

[94] France (A/C.6/63/SR.19, para. 18); Romania (A/C.6/63/SR.21, para. 54).

[95] Austria (A/C.6/63/SR.18, para. 79); France (A/C.6/63/SR.19, para. 20); Belarus (ibid., para. 49); Belgium (A/C.6/63/SR.21, para. 46); Greece (A/C.6/63/SR.24, para. 1).

[96] Sweden (A/C.6/63/SR.19, para. 39); Germany (A/C.6/63/SR.19, paras. 81 and 83).

[97] Belarus (A/C.6/63/SR.19, para. 52); Germany (ibid., para. 81).

[98] Austria (A/C.6/63/SR.18, para. 79); Germany (A/C.6/63/SR.19, para. 81).

[99] United Kingdom (A/C.6/63/SR.21, para. 19).

could not in any way exclude application of the provision in question in the relationship between the author of the declaration and the party having expressed opposition.[100]

44. Aside from the suggestions and criticisms made with regard to the wording of the draft guidelines already approved by the Commission that the Special Rapporteur and the Commission would consider during their second reading, it was suggested more generally that the subject of reactions to interpretative declarations was not sufficiently ripe for codification and that, therefore, drafting guidelines in that respect would go beyond the mandate of the Commission.[101] Other delegations, however, expressed support for the inclusion of such draft guidelines in the Guide to Practice.[102]

45. Several delegations expressed reservations about the concept of "reclassification", which they believed did not reflect reality. According to that view, it was pointless to change the classification of a declaration, since it could be assessed objectively according to criteria already agreed by the Commission.[103] Other delegations expressed support for the draft guideline presented by the Special Rapporteur.[104]

46. Other reservations were expressed with regard to the issue of "conditional interpretative declarations" and the separate treatment given to them in the study. Like the majority of Commission members,[105] several delegations argued that there was no reason to distinguish such declarations from reservations, since they obeyed the same rules.[106] According to another view, the pure and simple assimilation of conditional interpretative declarations with reservations nevertheless remained premature as long as the specific legal effects of those declarations had not been analysed by the Commission.[107]

D. Recent developments with regard to reservations and interpretative declarations

47. On 3 February 2009, the International Court of Justice rendered a unanimous Judgment in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*. In that dispute, Romania invoked paragraph 3 of its interpretative declaration made upon signature and confirmed upon ratification of the United Nations Convention on the Law of the Sea of 1982.[108] That declaration concerns article 121 of the Convention and reads as follows:

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[100] Germany (A/C.6/63/SR.19, para. 82).

[101] United States of America (A/C.6/63/SR.21, paras. 4-6; United Kingdom (ibid., para. 16). See also Islamic Republic of Iran (A/C.6/63/SR.24, para. 32).

[102] France (A/C.6/63/SR.19, para. 18); Sweden (ibid., para. 35); Spain (A/C.6/63/SR.22, para. 2); Greece (A/C.6/63/SR.24, para. 1). See, however, Poland (A/C.6/63/SR.21, para. 31).

[103] Austria (A/C.6/63/SR.18, para. 80); Sweden (A/C.6/63/SR.19, para. 36). See also Portugal (A/C.6/63/SR.20, para. 19); Greece (A/C.6/63/SR.24, para. 3). For another critical view on "reclassifications", see Republic of Korea (A/C.6/63/SR.19, para. 62).

[104] Mexico (A/C.6/63/SR.20, para. 4); Romania (A/C.6/63/SR.21, para. 54).

[105] See para. 38 above.

[106] Belarus (A/C.6/63/SR.19, paras. 49 and 50); Republic of Korea (ibid., para. 62); Estonia (ibid., para. 88); Netherlands (A/C.6/63/SR.20, para. 8); Spain (A/C.6/63/SR.22, para. 2).

[107] Portugal (A/C.6/63/SR.20, para. 22).

[108] United Nations, *Treaty Series*, vol. 1834, No. 31363.

"1. As a geographically disadvantaged country bordering a sea poor in living resources, Romania reaffirms the necessity to develop international cooperation for the exploitation of the living resources of the economic zones, on the basis of just and equitable agreements that should ensure the access of the countries from this category to the fishing resources in the economic zones of other regions or subregions.

"2. The Socialist Republic of Romania reaffirms the right of coastal States to adopt measures to safeguard their security interests, including the right to adopt national laws and regulations relating to the passage of foreign warships through their territorial sea.

"The right to adopt such measures is in full conformity with articles 19 and 25 of the Convention, as it is also specified in the Statement by the President of the United Nations Conference on the Law of the Sea in the plenary meeting of the Conference on April 26, 1982.

"3. The Socialist Republic of Romania states that according to the requirements of equity — as it results from articles 74 and 83 of the Convention on the Law of the Sea — the uninhabited islands and without economic life can in no way affect the delimitation of the maritime spaces belonging to the main land coasts of the coastal States."[109]

48. According to Romania, Ukraine accepted the applicability of article 121, paragraph 3 of the Montego Bay Convention in the delimitation of the continental shelf and exclusive economic zones, as interpreted by Romania when signing and ratifying it, and therefore Serpents' Island, which lies off the coasts of Romania and Ukraine, could not affect the delimitation between the two States.[110]

49. For its part, Ukraine stated, invoking the Commission's work on interpretative declarations, that its silence could not amount to consent to Romania's declaration because there is no obligation to respond to such a declaration.[111]

50. The Court seems to have admitted that point of view:

"Regarding Romania's declaration, quoted in paragraph 35 above, the Court observes that under Article 310 of UNCLOS, a State is not precluded from making declarations and statements when signing, ratifying or acceding to the Convention, provided these do not purport to exclude or modify the legal effect of the provisions of UNCLOS in their application to the State which has made a declaration or statement. The Court will therefore apply the relevant provisions of UNCLOS as interpreted in its jurisprudence, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. Romania's declaration as such has no bearing on the Court's interpretation."[112]

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[109] Ibid., vol. 1835, No. 31363.

[110] ICJ Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, para. 35; CR 2008/18, 2 September 2008, paras. 39-41 (M. Aurescu); CR 2008/20, 4 September 2008, paras. 73-79 (M. Lowe).

[111] ICJ Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, para. 39. See also CR 2008/29, 12 September 2008, paras. 63-68 (Mme Malintoppi).

[112] ICJ Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, para. 42.

51. The concrete implications of that Judgment will be discussed in the study of the effects of an interpretative declaration and the responses to which it might give rise.

52. For their part, the bodies created within the United Nations or by international human rights conventions have continued to develop and harmonize their approaches to this issue at inter-committee meetings. Those meetings provide a forum for the bodies to exchange their views on the subject of their experiences in reservations. Their respective practices in the field were presented and discussed at the meeting between the Commission and the representatives of human rights bodies, held in May 2007 pursuant to General Assembly resolution 61/34 of 4 December 2006.[113] At the meeting the practice of human rights bodies was said to be relatively uniform and characterized by a high level of pragmatism.[114]

53. At the December 2006 meeting of the Working Group on Reservations to examine the report on the practice of human rights treaty bodies with respect to reservations to international human rights treaties and report on its work to the inter-committee meeting, the recommendations adopted in June[115] were modified. The sixth inter-committee meeting welcomed the report of the working group on reservations[116] and accepted the recommendations thus modified:[117]

> "1. The working group welcomes the report on the practice of human rights treaty bodies with respect to reservations to international human rights treaties (HRI/MC/2005/5) and its updated version (HRI/MC/2005/5/Add.1) which the secretariat had compiled for the fourth inter-committee meeting.
>
> "2. The working group recommends that while any statement made at the time of ratification may be considered as a reservation, however it was termed, particular care should be exercised before concluding that the statement should be considered as a reservation, when the State party has not used that term.
>
> "3. The working group recognizes that, despite the specific nature of the human rights treaties which do not constitute a simple exchange of obligations between States but are the legal expression of the essential rights that each individual must be able to exercise as a human being, general treaty law remains applicable to human rights instruments; however, that law can only be applied taking fully into account their specific nature, including their content and monitoring mechanisms.
>
> "4. The working group considers that when reservations are permitted, whether explicitly or implicitly, they can contribute to the attainment of the objective of universal ratification. Reservations which are not permitted, including those that are incompatible with the object and purpose of the treaty, do not contribute to attainment of the objective of universal ratification.
>
> "5. The working group considers that for the purpose of discharging their functions, treaty bodies are competent to assess the validity of reservations

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[113] See, in the annex to the present report, the account of the meeting prepared by the Special Rapporteur. See also para. 24 above.

[114] See para. 7 of the annex to the present report.

[115] HRI/MC/2006/5, para. 16; see also the eleventh report on reservations to treaties, A/CN.4/574, para. 55.

[116] HRI/MC/2007/5 and Add.1.

[117] See the report of the nineteenth meeting of chairpersons of human rights treaty bodies, A/62/224, annex, subpara. 48 (v).

and, in the event, the implications of a finding of invalidity of a reservation, particularly in the examination of individual communications or in exercising other fact-finding functions in the case of treaty bodies that have such competence.

"6. The working group considers that the identification of criteria for determining the validity of reservations in the light of the object and purpose of a treaty may be useful not only for States when they are considering making reservations, but also for treaty bodies in the performance of their functions. In this regard, the working group notes the potential significance of the criteria contained in the draft guidelines included in the tenth report of the Special Rapporteur of the International Law Commission on reservations to treaties (A/CN.4/558/Add.1). The working group appreciated its dialogue with the International Law Commission and welcomes the prospect of further dialogue.

"7. As to the consequences of invalidity, the Working Group agrees with the proposal of the Special Rapporteur of the International Law Commission according to which an invalid reservation is to be considered null and void. It follows that a State will not be able to rely on such a reservation and, unless its contrary intention is incontrovertibly established, will remain a party to the treaty without the benefit of the reservation.

"8. The working group welcomes the inclusion of a provision on reservations in the draft harmonized guidelines on reporting under the international human rights treaties, including the common core document and treaty-specific reports (HRI/MC/2006/3).

"9. The working group recommends that:

(a) Treaty bodies should request in their lists of issues information, especially when it is provided neither in the common core document (where available), nor in the treaty-specific report, about:

(i) the nature and scope of reservations or interpretative declarations;

(ii) the reason why such reservations were considered to be necessary and have been maintained;

(iii) the precise effect of each reservation in terms of national law and policy;

(iv) any plans to limit the effect of reservations and ultimately withdraw them within a specific time frame.

(b) Treaty bodies should clarify to States parties their reasons for concern over particular reservations in light of the provisions of the treaty concerned and, as relevant, its object and purpose.

(c) Treaty bodies should in their concluding observations:

(i) welcome the withdrawal, whether total or partial, of a reservation;

(ii) acknowledge ongoing reviews of reservations or expressions of willingness to review;

(iii) express concern for the maintenance of reservations;

(iv) encourage the complete withdrawal of reservations, the review of the need for them or the progressive narrowing of scope through partial withdrawals of reservations.

(d) Treaty bodies should highlight the lack of consistency among reservations formulated to certain provisions protected in more than one treaty and encourage the withdrawal of a reservation on the basis of the availability of better protection in other international conventions resulting from the absence of a reservation to comparable provisions.

"10. The working group recommends that the inter-committee meeting and the meeting of chairpersons decide whether another meeting of the working group should be convened taking into account the reactions and queries of treaty bodies on the recommendations of the working group, the outcome of the meeting with the International Law Commission and any further developments in the International Law Commission on the subject of reservations to treaties."[118]

54. The most remarkable change relates to paragraph 7, on the consequences the formulation of an invalid reservation has for the convention obligation of the author of the reservation. The previous text placed the emphasis on the intention of the State "at the time it enters its reservation", an intention which must be determined "during a serious examination of the available information, with the presumption, which may be refuted, that a State would prefer to remain a party to the treaty without the benefit of the reservation".[119] The new formulation of paragraph 7 places the emphasis solely on the presumption that the State entering an invalid reservation has the intention to remain bound by the treaty without the benefit of the reservation as long as its contrary intention has not been "incontrovertibly" established — which perhaps goes a little far (and in any case does not reflect the Special Rapporteur's position).

55. In the context of the Universal Periodic Review mechanism, the Human Rights Council has raised the issue of reservations with States under review, and a number of them have been urged to withdraw their reservations to international human rights instruments.[120]

56. At the regional level, the Inter-American Court of Human Rights has again had to face the issue of reservations. In *Boyce et al. v. Barbados*, the Court had to rule on the effects of the respondent State's reservation to the Inter-American Human Rights Convention.[121] This reservation reads:

"In respect of 4(4), the criminal code of Barbados provides for death by hanging as a penalty for murder and treason. The Government is at present reviewing the whole matter of the death penalty which is only rarely inflicted but wishes to enter a reservation on this point in as much as treason in certain

[118] HRI/MC/2007/5, para. 19.

[119] See HRI/MC/2006/5, para. 16.

[120] HRI/MC/2008/5, para. 3. See the reports of the Working Group on the Universal Periodic Review, Bahrain (A/HRC/8/19, para. 6 (2)), Tunisia (A/HRC/8/21, para. 83 (3)), Morocco (A/HRC/8/22, para. 75 (3)), Malaysia (A/HRC/8/23, para. 76 (2)), United Kingdom (A/HRC/8/25, para. 56 (24) to (26)), India (A/HRC/8/26, para. 86 (9)), Algeria (A/HRC/8/29, para. 69 (10)) and Netherlands (A/HRC/8/31, para. 78 (10)).

[121] Judgement of 20 November 2007, *Series C, No. 169*, paras. 13-17.

circumstances might be regarded as a political offence and falling within the terms of section 4(4).

"In respect of 4(5) while the youth or old age of an offender may be matters which the Privy Council, the highest Court of Appeal, might take into account in considering whether the sentence of death should be carried out, persons of 16 years and over or over 70 years of age may be executed under Barbadian law."[122]

57. Barbados maintained inter alia that its reservation to the Convention prevented the Court from ruling on the question of capital punishment, on the one hand, and the means of carrying it out, on the other.

58. Citing its advisory opinions of 1982 and 1983,[123] the Court recalled:

"Firstly, in interpreting reservations the Court must first and foremost rely on a strictly textual analysis. Secondly, due consideration must also be assigned to the object and purpose of the relevant treaty which, in the case of the American Convention, involves the 'protection of the basic rights of individual human beings'. In addition, the reservation must be interpreted in accordance with Article 29 of the Convention, which implies that a reservation may not be interpreted so as to limit the enjoyment and exercise of the rights and liberties recognized in the Convention to a greater extent than is provided for in the reservation itself."[124]

59. Having considered the reservation of Barbados from this standpoint, the Court concluded that:

"the text of the reservation does not explicitly state whether a sentence of death is mandatory for the crime of murder, nor does it address whether other possible methods of execution or sentences are available under Barbadian law for such a crime. Accordingly, the Court finds that a textual interpretation of the reservation entered by Barbados at the time of ratification of the American Convention clearly indicates that this reservation was not intended to exclude from the jurisdiction of this Court neither the mandatory nature of the death penalty nor the particular form of execution by hanging. Thus the State may not avail itself of this reservation to that effect."[125]

60. The Court emphasizes, moreover, that it "has previously considered that 'a State reserves no more than what is contained in the text of the reservation itself'".[126] These findings relate to the interpretation of reservations, an issue hitherto neglected in the work of the Commission, and the effects of reservations; they are very useful, and should be taken into consideration when the Committee considers these issues.

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[122] United Nations, *Treaty Series*, vol. 1298, p. 441 (No. A-17955).

[123] Advisory opinion OC-2/82, 24 September 1982, *Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Series A, No. 2*, para. 35; advisory opinion OC-3/83, 8 September 1983, *Restrictions to the Death Penalty (Arts. 4(2) and 4(4)) American Convention on Human Rights, Series A, No. 3*, paras. 62-66.

[124] Judgement cited in note. 121, para. 15 (footnotes omitted).

[125] Ibid., para. 17.

[126] Ibid. See also advisory opinion OC-3/83, note 123 above, para. 69.

61. The European Court of Human Rights, for its part, has also had occasion to rule on the extent of the effects of a valid reservation. In two cases against Finland, the Court referred to and considered the application of the Finnish reservation to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[127] The reservation reads as follows:

> "For the time being, Finland cannot guarantee a right to an oral hearing insofar as the current Finnish laws do not provide such a right. This applies to:
>
> "1. proceedings before the Supreme Court in accordance with Chapter 30, Section 20, of the Code of Judicial Procedure and proceedings before the Courts of Appeal as regards the consideration of petition, civil and criminal cases to which Chapter 26 (661/1978), Sections 7 and 8, of the Code of Judicial Procedure are applied if the decision of a District Court has been made before 1 May 1998, when the amendments made to the provisions concerning proceedings before Courts of Appeal entered into force;
>
> "and the consideration of criminal cases before the Supreme Court and the Courts of Appeal if the case has been pending before a District Court at the time of entry into force of the Criminal Proceedings Act on 1 October 1997 and to which existing provisions have been applied by the District Court;
>
> "2. proceedings, which are held before the Insurance Court as the Court of Final Instance, in accordance with Section 9 of the Insurance Court Act, if they concern an appeal which has become pending before the entry into force of the Act Amending the Insurance Court Act on 1 April 1999;
>
> "3. proceedings before the Appellate Board for Social Insurance, in accordance with Section 8 of the Decree on the Appellate Board for Social Insurance, if they concern an appeal which has become pending before the entry into force of the Act Amending the Health Insurance Act on 1 April 1999."

62. According to the Court, the application of this reservation deprives the applicant of the right, otherwise guaranteed in the context of article 6 of the Convention, to be heard:

> "In view of the above and having regard to the terms of Finland's reservation, Finland was under no Convention obligation to ensure in respect of the Court of Appeal that an oral hearing was held on count 9. While it is true that the effect of the reservation was to deny the applicant a right to an oral hearing as to the charge in dispute before the Court of Appeal, this result must be considered compatible with the Convention as a consequence of the operation of a valid reservation" (see *Helle v. Finland*, Judgment of 19 December 1996, *Reports 1997*, pp. 2925-2926, §§ 44 and 47).[128]

63. Nevertheless — and on this point the decisions of the European Court are reminiscent of the decision of the Inter-American Court[129] — the application of the reservation does not release Finland from the obligation to respect the other

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[127] *Treaty Series of the Council of Europe*, No. 005.

[128] Judgement of 12 April 2007, *Laaksonen v. Finland* (Application No. 70216/01), para. 24 — the Judgement is available only in English. See also Judgement of 24 April 2007, *V. v. Finland* (Application No. 40412/98), para. 61.

[129] See paras. 56-60 above.

guarantees associated with the right to a fair trial. As the reservation relates only to the issue of the right to an oral hearing before certain courts, Finland remains bound by its obligation to ensure a fair trial. The Finnish reservation could thus not exclude the applicability of article 6 as a whole, and the Court remains competent to rule on the obligations that are not covered by the reservations.[130]

64. In the context of the Council of Europe (in the Committee of Legal Advisers on Public International Law), the member States are continuing to consider and, where necessary, react collectively or at least in a concerted manner to invalid reservations, in conformity with Recommendation No. 12 (99) 13 on responses to inadmissible reservations to international treaties.[131] Since 2004, the European Observatory of Reservations to International Treaties has been considering from a more sectoral standpoint the reservations and declarations to the international treaties relating to the fight against terrorism. It is interesting to note in this respect that the list submitted periodically by the European Observatory to the Committee containing the reservations and declarations to international treaties that are likely to give rise to objections not only reproduces reservations formulated less than 12 months previously, the limit set by article 20, paragraph 5 of the Vienna Conventions, but also draws the attention of Member States to certain reservations formulated more than 12 months earlier.[132] This practice appears to suggest that the Observatory does not consider that these reservations whose validity it deems to be open to dispute can no longer be the subject of objections, and that a response, belated though it may be, remains not only possible but also desirable. This confirms that draft directive 2.6.15 (late objections), adopted in 2008, probably meets a need.[133]

E. Plan of the fourteenth report on reservations[134]

65. Following a rapid presentation of certain additional points relating to the procedure with respect to the formulation of interpretative statements in accordance with the wishes of the Commission,[135] the present report will deal with the third and fourth parts of the Guide to Practice, that is to say with issues relating to the validity of reservations,[136] interpretative declarations and reactions to reservations and interpretative declarations, on the one hand, and the effects of reservations, acceptances of reservations, objections to reservations, interpretative declarations and the reactions to them, on the other hand. If possible, a fourth part will deal with

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[130] Judgement of 12 April 2007, *Laaksonen v. Finland* (Application No. 70216/01), para. 25; Judgement of 24 April 2007, *V. v. Finland* (Application No. 40412/98), para. 61.

[131] See also the third report on reservations to treaties, A/CN.4.491, paras. 28 and 29, the eighth report, A/CN.4/535, para. 23, and the eleventh report, A/CN.4/574, para. 56.

[132] See, for example, the United States reservation to the United Nations Convention against Corruption, formulated in 2003, CAHDI (2008) 5, 19 February 2008, No. C.5.

[133] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 124.

[134] The Special Rapporteur wishes to express his most profound gratitude to Daniel Müller, doctoral student and researcher at the International Law Centre (CEDIN) of the Université Paris-Ouest, Nanterre-La Défense, for the decisive role he played in drafting the present report.

[135] See para. 36 above.

[136] One part of this problem has already been the subject of the tenth report on reservations (A/CN.4/558 and Corr.1, Add.1 and Corr.1 and 2, and Add.2). A number of draft guidelines in the third part have already been provisionally adopted by the Commission (see para. 23 above).

the draft guidelines that might be adopted by the Commission on the basis of the valuable study drawn up by the Codification Division on "reservations in the context of the succession of States".

66. Furthermore, the Special Rapporteur has decided to propose to the Commission the addition to the Guide to Practice of two annexes. The first of these might consist of a recommendation relating to the "reservations dialogue", since, upon reflection, it seems difficult to incorporate provisions relating to this in the body of the Guide: it is more, however, a state of mind that is reflected in a desirable diplomatic practice than an exercise in codification, flexible. As for the second annex, it could deal with the implementation mechanism that might be incorporated in the Guide to Practice. These two draft annexes will be the subject of two separate parts of the present report.

II. Procedure for the formulation of interpretative declarations (continuation and conclusion)

67. At its sixtieth session, the Commission asked the Special Rapporteur to prepare draft guidelines on the form, statement of reasons for and communication of interpretative declarations in order to fill a gap in the second part of the Guide to Practice.[137]

68. The Commission has already adopted a set of rules on the procedure for the formulation of interpretative declarations, contained in section 2.4 of the Guide to Practice. These draft guidelines concern the authorities competent to formulate an interpretative declaration (draft guideline 2.4.1[138]), formulation of an interpretative declaration at the internal level (draft guideline 2.4.2 [2.4.1 bis][139]), time at which an interpretative declaration may be formulated (draft guideline 2.4.3[140]), non-requirement of confirmation of interpretative declarations made when signing a treaty (draft guideline 2.4.4 [2.4.5][141]), late formulation of an interpretative declaration (draft guideline 2.4.6 [2.4.7][142]) and modification of an interpretative declaration (draft guideline 2.4.9[143]). This section also includes other draft guidelines on conditional interpretative declarations.[144]

69. There is no draft guideline on the form of interpretative declarations, on their communication (contrary to what has been decided in the case of conditional

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[137] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), paras. 74 and 117; see also the position taken by the Special Rapporteur in his thirteenth report on reservations to treaties (A/CN.4/600), para. 321. See para. 36 above.

[138] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 103.

[139] Ibid.

[140] Ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 157.

[141] Ibid.

[142] Ibid.

[143] Ibid., *Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 295.

[144] Draft guidelines 2.4.5 [2.4.4], 2.4.7 [2.4.2, 2.4.9], 2.4.8 and 2.4.10.

interpretative declarations[145]) or on modification of interpretative declarations. This is not an oversight, but a deliberate decision on the Special Rapporteur's part.[146] As he explained in his sixth report:

> There seems to be no reason to transpose the rules governing the communication of reservations to simple interpretative declarations, which may be formulated orally; it would therefore be paradoxical to insist that they be formally communicated to other interested States or international organizations. By refraining from such communication, the author of the declaration runs the risk that the declaration may not have the intended effect, but this is a different problem altogether. It does not seem necessary, therefore, to include a clarification of this point in the Guide to Practice.[147]

70. There is no reason to reconsider this conclusion. There would be no justification for requiring a State or an international organization to follow a given procedure in giving its interpretation of a convention to which it is a party or a signatory or to which it intends to become a party. It would thus be incongruous to propose draft guidelines that made the formal validity of an interpretative declaration condition upon respect for such a procedure.[148]

71. Nevertheless, while there is no legal obligation in that regard, it seems appropriate to ensure, to the extent possible, that interpretative declarations are publicized widely. Their influence will, in practice, depend to a great extent on their dissemination. Without discussing, at this stage, the legal implications of these declarations for the interpretation and application of the treaty in question, it goes without saying that such unilateral statements are likely to play a role in the life of the treaty; this is their raison d'être and the purpose for which they are formulated by States and international organizations. The International Court of Justice has highlighted the importance of these statements in practice:

> Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value

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[145] See draft guideline 2.4.7 [2.4.2, 2.4.9] on the formulation and communication of interpretative declarations. This draft guideline reads:

> 2.4.7 [2.4.2, 2.4.9] *Formulation and communication of conditional interpretative declarations*
>
> A conditional interpretative declaration must be formulated in writing.
>
> Formal confirmation of a conditional interpretative declaration must also be made in writing.
>
> A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.
>
> A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

[146] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 154.

[147] Sixth report on reservations to treaties (A/CN.4/518/Add.1), para. 130.

[148] See also M. Heymann, *Einseitige Interpretationserklärungen zu multilateralen Verträgen* ("Unilateral Interpretative Declarations to Multilateral Treaties") (Berlin, Duncker & Humblot, 2005), p. 117.

when they contain recognition by a party of its own obligations under an instrument.[149]

72. Mr. Rosario Sapienza also underlined the importance of reactions to interpretative declarations, which:

> forniranno utile contributo anche alla soluzione [of a dispute]. E ancor più le dichiarazioni aiuteranno l'interprete quando controversia non si dia, ma semplice problema interpretativo.[150]
>
> [will contribute usefully to the settlement [of a dispute]. Statements will be still more useful to the interpreter when there is no dispute, but only a problem of interpretation].

73. In her study, *Einseitige Interpretationserklarungen zu multilateralen Verträgen* (Unilateral Interpretative Declarations to Multilateral Treaties), Ms. Monika Heymann has rightly stressed:

> Dabei ist allerdings zu beachten, dass einer schriftlich fixierten einfachen Interpretationserklärung eine größere Bedeutung dadurch zukommen kann, dass die übrigen Vertragsparteien sie eher zur Kenntnis nehmen und ihr im Streitfall eine höhere Beweisfunktion zukommt.[151]
>
> [In that regard, it should be noted that a simple written interpretative declaration can take on greater importance because the other contracting parties take note of it and, in the event of a dispute, it has greater probative value.]

74. Moreover, in practice, States and international organizations endeavour to give their interpretative declarations the desired publicity. They transmit them to the depositary and the Secretary-General of the United Nations, in turn, disseminates the text of such declarations[152] and publishes them in *Multilateral Treaties Deposited with the Secretary-General*.[153] Clearly, this communication procedure, which ensures wide publicity, presupposes that declarations are made in writing.

75. If the authors of interpretative declarations want their position to be taken into account in the treaty's application, particularly when there is a dispute, it would doubtless be in their interest to:

(a) Formulate the reaction in writing to meet the requirements of legal security and to ensure notification of the declaration; and

(b) Follow, in making such statements, the same communication and notification procedure applicable to the communication and notification of other declarations in respect of the treaty (reservations, objections or acceptances).

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[149] Advisory opinion of 11 July 1950, *International status of South-West Africa*, I.C.J. Reports 1950, pp. 135-136.

[150] *Dichiarazioni interpretative unilaterale e trattati internazionali* (Milan, A. Giuffrè, 1996), p. 275.

[151] M. Heymann, note 148 above, p. 118.

[152] United Nations, *Summary of practice of the Secretary-General as depositary of multilateral treaties* (ST/LEG/7/Rev.1), para. 218.

[153] To give just one example, while article 319 of the United Nations Convention on the Law of the Sea does not explicitly require its depositary to communicate interpretative declarations made under article 311 of the Convention, the Secretary-General publishes them systematically in Chapter XXI (No. 6) of *Multilateral Treaties Deposited with the Secretary-General* (http://treaties.un.org).

76. The Commission has considered that it would be useful to include draft guidelines to that effect in the Guide to Practice.[154] However, these could consist only of recommendations modelled on those adopted, for example, with respect to statements of reasons for reservations[155] and objections to reservations.[156] Guidelines recommending the written form and the procedure for communication could draw upon those concerning the procedure for other types of declarations in respect of a treaty, as, for example, contained in draft guidelines 2.1.1[157] and 2.1.5 to 2.1.7[158] on reservations, although their wording cannot be fully aligned with these models. It is therefore proposed that these guidelines should be worded as follows:[159]

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[154] See note 137 above.

[155] Draft guideline 2.1.9 (Statement of reasons [for reservations]) (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 124); see also the note by the Special Rapporteur on draft guideline 2.1.9, "Statement of reasons for reservations" (A/CN.4/586).

[156] Draft guideline 2.6.10 (Statement of reasons [for objections]) (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 124); see also the eleventh report on reservations to treaties (A/CN.4/574), paras. 110-111.

[157] This draft guideline reads:

2.1.1 *Written form*

A reservation must be formulated in writing.

[158] These draft guidelines read:

2.1.5 *Communication of reservations*

A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A reservation to a treaty in force which is the constituent instrument of an international organization or to a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

2.1.6 [2.1.6, 2.1.8] *Procedure for communication of reservations*

Unless otherwise provided in the treaty or agreed by the contracting States and international contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) If there is a depositary, to the latter, which shall notify the States and international organizations for which it is intended as soon as possible.

A communication relating to a reservation shall be considered as having been made with regard to a State or an international organization only upon receipt by that State or organization.

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile.

2.1.7 *Functions of depositaries*

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned.

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) The signatory States and organizations and the contracting States and contracting organizations; or

(b) Where appropriate, the competent organ of the international organization concerned.

[159] The numbering of these guidelines will certainly need to be reviewed during the second reading.

2.4.0 Written form of interpretative declarations

Whenever possible, an interpretative declaration should be made in writing.

2.4.3 bis Communication of interpretative declarations

Whenever possible, an interpretative declaration should be made, mutatis mutandis, in accordance with the procedure established in draft guidelines 2.1.5, 2.1.6 and 2.1.7.

77. This raises the question of whether the depositary can initiate a consultation procedure in cases where an interpretative declaration is manifestly invalid, in which case draft guideline 2.1.8[160] should also be mentioned in draft guideline 2.4.3 bis. Since, on the one hand, draft guideline 2.1.8 has met with criticism[161] and, on the other, it is far from clear that an interpretative declaration can be "valid" or "invalid", it seems unnecessary to make such a mention.

78. Notwithstanding the position expressed by some members of the Commission at its sixtieth session, with which the Special Rapporteur had unwisely agreed in his thirteenth report,[162] statements of reasons for interpretative declarations does not appear to correspond to the practice of States and international organizations or, in essence, to meet a need. In formulating interpretative declarations, States and international organizations doubtless wish to set forth their position concerning the meaning of one of the treaty's provisions or of a concept used in the text of the treaty and, in general, they explain the reasons for this position. It is not necessary, or even possible, to provide explanations for these explanations. Thus, a guideline, even in the form of a simple recommendation, is not needed.

79. The situation is different with respect to reactions to interpretative declarations. In this case, the authors of an approval, opposition or reclassification may indeed explain the reasons that led them to react to the interpretative declaration in question, for example by explaining why the proposed interpretation does not correspond to the parties' intention, and it is doubtless useful for them to do so. Draft guideline 2.9.6 (Statement of reasons for approval, opposition and reclassification), proposed in the thirteenth report[163] and sent to the Drafting Committee in 2008,[164] is thus of continuing value.

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[160] This draft guideline reads:

2.1.8 [2.1.7 bis] *Procedure in case of manifestly invalid reservations*

Where, in the opinion of the depositary, a reservation is manifestly invalid, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes the grounds for the invalidity of the reservation.

If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.

[161] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 159, paras. 2 and 3 of the commentary on draft guideline 2.1.8. See also para. 36 above.

[162] See note 137 above.

[163] A/CN.4/600, para. 321.

[164] See para. 39 above.

Annex

Meeting with human rights bodies, 15 and 16 May 2007[a]

Report prepared by Alain Pellet, Special Rapporteur[b]

1. Pursuant to General Assembly resolution 61/34 of 4 December 2006, the International Law Commission convened a meeting with representatives of United Nations human rights treaty bodies and regional human rights bodies. The meeting took place on 15 and 16 May 2007 at the United Nations Office at Geneva and provided an opportunity for a fruitful exchange of views that was welcomed by all participants.

2. Mr. Ian Brownlie, Q.C., Chairman of the International Law Commission, chaired the meeting, the last segment of which was co-chaired by Sir Nigel Rodley, member of the Human Rights Committee and Chairperson-Rapporteur of the working group on reservations to treaties of the Meeting of chairpersons of the human rights treaty bodies. Mr Brownlie welcomed the participants and explained that the meeting offered a unique opportunity to pursue a dialogue with the human rights bodies on the issue of reservations to treaties. Mr. Alain Pellet, Special Rapporteur of the International Law Commission on reservations to treaties, underscored the importance of such an exchange of ideas for strengthening mutual understanding between the Commission and the human rights expert bodies.

1. Introduction of the practice of the human rights bodies represented

3. The meeting began with brief presentations by the representatives of the human rights bodies participating in the meeting on the respective practice of each of the bodies represented, with the understanding that neither those presentations nor what was said during the meeting would in any way engage the responsibility of the bodies in question. The following bodies were represented: the Committee on Economic, Social and Cultural Rights; the Human Rights Committee; the Committee against Torture; the Committee on the Rights of the Child; the Committee on the Elimination of Racial Discrimination; the Committee on the Elimination of Discrimination against Women; the Committee on Migrant Workers; the Council of Europe (the European Court of Human Rights and the Committee of Legal Advisers on Public International Law (CAHDI));[c] and the Sub-Commission on the Promotion and Protection of Human Rights.

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[a] The present report — which is not a "statement of conclusions" — was prepared on the sole responsibility of the Special Rapporteur on reservations to treaties. It was submitted for opinion to outside participants and to those members of the Commission who had made introductory presentations but in no way engages their responsibility. This annex is a very slightly revised version of the document that appears on the web site of the International Law Commission (http://untreaty.un.org/ilc/documentation/french/ilc(lix)_rt_crpl.pdf).

[b] I wish to extend warm thanks to Céline Folsché, intern from New York University (LLM) during the fifty-ninth session of the International Law Commission, who wrote the first draft of this report.

[c] The other regional bodies invited were unable to send representatives.

(a) Reservations to human rights treaties

4. The use of reservations in human rights treaties varied from treaty to treaty. For that matter, some conventions explicitly provided for the formulation of reservations (Convention against Torture, European Convention on Human Rights and Fundamental Freedoms). Two broad trends could be observed.

5. On the one hand, some treaties — in particular, those that had been widely ratified — had been the subject of numerous reservations. Significant examples included the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, but also the conventions against torture and the elimination of all forms of racial discrimination and the European Convention on Human Rights and Fundamental Freedoms. Conversely, few reservations had been made to the International Covenant on Economic, Social and Cultural Rights.

6. On the other hand, reservations were too frequently made to fundamental or substantive provisions of human rights treaties. In that connection, the representative of the Committee on the Elimination of Racial Discrimination pointed to the large number of reservations made to article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, concerning the prohibition of incitement to hatred or to racial discrimination. The same comment was made with regard to the Convention on the Elimination of All Forms of Discrimination against Women.

(b) The practice of human rights bodies with respect to reservations

7. The practice of human rights bodies, as described by some representatives, was relatively uniform and was characterized by a high level of pragmatism. The question of reservations could arise in two situations: the consideration of periodic reports submitted by States and the examination of individual communications. However, the latter option was available only to bodies charged with receiving individual petitions or communications.

8. In considering the periodic reports submitted by States, nearly all the various committees had taken a somewhat pragmatic approach to the question of reservations. Their chief position was that the formulation of reservations by States should be strictly limited. In practice, however, they were relatively flexible and showed great willingness to establish a dialogue with States, to which the latter were generally amenable. While encouraging and recommending the withdrawal of reservations, the committees engaged in discussions with States about the justification and the scope of their reservations. Although the objective of the dialogue was the complete withdrawal of reservations, the committees' position was flexible, owing to their goal of achieving universal ratification of their conventions. Only very rarely had the committees taken a formal position to declare a reservation invalid.

9. Some committees had considered the scope and even the validity of reservations when considering individual communications or requests. However, that practice was limited, if only because few bodies received such communications or requests. Currently, only the Human Rights Committee and the European Court of Human Rights followed it. In the case of the Human Rights Committee, the risk

that the State whose reservation was declared invalid might withdraw from the Optional Protocol could not be overlooked.

2. Presentations

10. Presentations serving as a basis for the discussion were delivered by:

- Mr. Alain Pellet, Special Rapporteur of the International Law Commission on reservations to treaties: "Codification of the right to formulate reservations to treaties";
- Ms. Françoise Hampson, member of the Sub-Commission on the Promotion and Protection of Human Rights: "Principal aspects of the problem";
- Mr. Enrique Candioti, member of the International Law Commission: "Grounds for the invalidity of reservations to human rights treaties";
- Mr. Alexandre Sicilianos, member of the Committee on the Elimination of Racial Discrimination: "Assessment of the validity of reservations to human rights treaties";
- Mr. Giorgio Gaja, member of the International Law Commission: "The consequences of the non-validity of reservations to human rights treaties".

(a) Codification of the right to formulate reservations to treaties

11. Mr. Alain Pellet, Special Rapporteur of the International Law Commission on reservations to treaties, described the history of the codification of the law of treaties. He began by recalling the Commission's mission of codification and presenting the Vienna Convention on the Law of Treaties as its most significant achievement. He went on to describe the process used by the Commission in drawing up draft conventions or draft guidelines. Lastly, he described the Commission's consideration of the topic of reservations.

12. Although flexible and relatively detailed, the Vienna regime was vague and ambiguous with respect to the legal regime of reservations to treaties. Efforts to draft a Guide to Practice that would complement the provisions of the Vienna Conventions had been initiated in 1996. The lack of specific rules governing reservations to human rights treaties had been considered by the drafters of the Vienna Convention. For one thing, human rights treaties had not been accorded the same importance at the time the Convention was drafted; for another, and most notably, the authors of the Convention, who had been cognizant of the specificity of certain types of treaties, including human rights treaties (see article 60, paragraph 5), had intended that the rules pertaining to reservations should be uniformly applied. However, as the Special Rapporteur had demonstrated in his second report (A/CN.4/478/Rev.1), the considerable extent of practice in respect of reservations to human rights treaties could not be ignored, and the International Law Commission was thus very interested in the practice of human rights bodies.

(b) Principal aspects of the problem

13. Ms. Françoise Hampson, member of the Sub-Commission on the Promotion and Protection of Human Rights, began by outlining those aspects of the problem on which there was general consensus. One point on which consensus had been reached

was the principle that reservations that were incompatible with the object and purpose of a treaty produced no effects. An invalid reservation was null and void. In such cases it was assumed that the other contracting parties did not have the option of accepting such a reservation. Moreover, articles 20 to 23 of the Vienna Convention on the Law of Treaties and, in particular, the rules concerning objections to reservations did not apply in the event of incompatibility. The "validity" or "effectiveness" of a reservation depended on an objective criterion and not on the potential acceptance or objection of States. Such a declaration of incompatibility could be made by the contracting parties — which were not compelled to take such action — or by any body whose functions required it to take such a decision.

14. There was also consensus that there was no special regime applicable to reservations to human rights treaties. Nevertheless, the possibility existed that certain specific situations might produce predictable results. In the case of human rights treaties, the bodies established by those instruments were competent to determine whether or not a reservation was compatible with the object and purpose of the treaty. That observation applied both to judicial bodies that were competent to hand down decisions having the authority of *res judicata* and to bodies whose monitoring of the implementation of treaties resulted in recommendations or opinions that were not legally binding.

15. Ms. Hampson next identified the areas in which problems remained. There were a number of unanswered questions with respect to the general regime of reservations and, in particular, with respect to the effects that a declaration of incompatibility of a reservation with the object and purpose of a treaty might have. In the case of human rights treaties, questions arose as to whether the treaty bodies were under an obligation to enter into a "reservations dialogue" with States or simply had the option of doing so. Moreover, given the diversity of human rights bodies, it was difficult to adopt a general method for assessing a reservation's compatibility with the object and purpose of the treaty. Lastly, in cases involving incompatibility, the question arose as to the severability of the invalid reservation and whether or not the author of the reservation retained the status of contracting party. The precedents established by the human rights bodies and the reactions of the States that had taken the floor in the Sixth Committee of the General Assembly would seem to indicate that the rule of severability could stand to be revised in certain areas of international law and, in particular, in the area of human rights.

(c) Grounds for the invalidity of reservations to human rights treaties

16. Mr. Enrique Candioti, member of the International Law Commission, emphasized that it was difficult to define objectively the grounds for the invalidity of reservations to treaties. He described the draft guidelines contained in the Guide to Practice that had been prepared by the Commission. The Special Rapporteur had proposed a general definition according to which a reservation was incompatible with the object and purpose of a treaty if it affected an essential element of the treaty. Another group of guidelines concerning non-derogable norms and human rights treaties were currently being considered by the Commission.

(d) Assessment of the validity of reservations to human rights treaties

17. Mr. Alexandre Sicilianos, member of the Committee on the Elimination of Racial Discrimination, generally approved of the principles contained in the tenth report on reservations to treaties (A/CN.4/558 and Add.1 and 2) and in particular the assertion that human rights bodies were competent to assess a reservation's compatibility with the object and purpose of a treaty. He particularly supported the draft guideline which indicated that there were various bodies that were competent to determine the validity of a reservation.

18. Human rights bodies — for which the issue of human rights was not necessarily paramount — assessed reservations through two distinct procedures: the consideration of periodic reports and the examination of individual complaints.

19. In considering reports, committees exercised a quasi-"diplomatic" function. In some instances, the assessment of reservations was clear-cut. There were, however, situations in which it was not necessarily useful or desirable for the committee to make a "yes" or "no" pronouncement. For that reason, Mr. Sicilianos recommended that the realities of the situation should be taken into account: it was essential to deal with political considerations as well as with practical problems (such as the amount of time available to committees for considering reports). He stressed the importance of dialogue with States and of studying States' internal law, since reservations could not be considered in the abstract and their scope was dependent on internal law. It was therefore necessary to establish priorities for the purpose of determining the validity of reservations during the consideration of reports.

20. The individual complaints procedures of the human rights bodies conferred a quasi-judicial function on those bodies. Although the bodies' decisions were not binding, the States concerned were required to draw the appropriate conclusions from the opinions expressed by the bodies. Mr. Sicilianos stressed that a distinction should be made between reservations to jurisdictional clauses and reservations to substantive provisions. He drew attention in that connection to the Judgment of the International Court of Justice of 3 February 2006 in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*.

(e) The consequences of the non-validity of reservations to human rights treaties

21. Mr. Giorgio Gaja, member of the International Law Commission, shared the view expressed by Ms. Hampson that articles 20 to 23 of the Vienna Convention did not apply to invalid reservations, and particularly to those that were incompatible with the object and purpose of the treaty. Nevertheless, in practice it was generally considered that even invalid reservations were subject to the general regime of reservations and could therefore be accepted by other contracting States.

22. The treaty bodies made use of their authority to play an active role in respect of reservations they considered invalid. They relied on two techniques to accomplish that end. The first was the approach taken by the European Court of Human Rights in the case of *Belilos v. Switzerland*. The Court had concluded that the willingness of Switzerland to be a party to the Convention was "stronger" than its willingness to maintain the reservation in question. The invalidity of the reservation did not subsequently impair Switzerland's status as a State party to the Convention.

23. The second approach was the one adopted by the Human Rights Committee in its general comment No. 24. The Committee did not seek to verify a State's willingness to be bound by the Covenant. It maintained that reservations were severable from the treaty and produced no effects if they were incompatible with its object and purpose.

24. Mr. Gaja urged caution. A restrictive attitude towards the reserving State could lead to political difficulties, such as a State's withdrawal from the Optional Protocol concerning individual communications. He welcomed the spirit of openness to dialogue that existed between the human rights treaty bodies and States. Even though the question of the validity of reservations was a difficult one, a "gentle" approach was called for. The reservations dialogue should be encouraged by the Commission.

3. Summary of the discussion

25. The members of the International Law Commission and the representatives of the human rights bodies had an opportunity to participate in a general discussion following each of the presentations. Mr. Roman A. Kolodkin and Ms. Xue Hanqin, members of the Commission, summarized the discussions on grounds for and assessment of the validity of reservations and on the consequences of the non-validity of reservations, respectively. Their views are reflected in the present report, as are the conclusions of Sir Nigel Rodley, member of the Human Rights Committee and Chairperson-Rapporteur of the working group on reservations of the meeting of chairpersons of human rights treaty bodies.

(a) The specific nature of human rights treaties

26. Some participants emphasized the special nature of human rights treaties. That specific nature did not, however, imply that the law of treaties was not applicable to them. Human rights treaties continued to be governed by treaty law.

27. The special nature of human rights treaties was reflected in the test provided for in article 19 (c) of the Vienna Convention on the Law of Treaties, which concerned the incompatibility of a reservation with the object and purpose of the treaty. It was nevertheless pointed out that that specific feature was not unique and that environmental protection treaties and disarmament treaties also presented particular features that could have an impact in terms of reservations. The reason that human rights treaties were of special interest to the Commission was that they had treaty monitoring bodies. The representatives of the human rights bodies stressed the fact that it was not necessary to establish a separate regime governing reservations to human rights treaties. However, they did feel that the general regime should be applied in an appropriate and suitably adapted manner.

28. A number of participants highlighted the fact that the delicate balance between the integrity and the universality of the treaty lay at the heart of the debate on the specific nature of human rights treaties. According to some, the treaty bodies gave precedence to integrity; however, the opposing view was also expressed, i.e., that treaty bodies sought to work on the basis of reservations and to hold discussions with States, which showed a greater concern for universality.

(b) The use of the term "validity"

29. Several participants expressed uncertainty as to the terminology to be employed. All the members of the human rights bodies had used the term "validity". Nevertheless, notwithstanding the previous decision of the International Law Commission on the matter, some Commission members were once again specifically opposed to the use of that term, owing to its objectivistic connotation and lack of neutrality.

(c) Grounds for invalidity

30. The participants were in general agreement that article 19 of the Vienna Convention on the Law of Treaties set forth the conditions for the validity of a reservation. However, discussion focused on subparagraph (c), according to which a reservation was prohibited if it was "incompatible with the object and purpose of the treaty". While some participants were opposed to the use of the term "reservation" to designate a reservation that was prohibited under article 19 (c), others pointed to the practical problem that would arise if another term was used.

31. It was noted that because it was not possible to establish a standard criterion for the object and purpose, the draft guidelines of the International Law Commission had been limited to identifying typical problems and attempting to illustrate article 19 (c).

32. Many participants noted the problematic nature of general and vague reservations. Although they were not considered to be incompatible with the object and purpose of the treaty, it was impossible to assess the validity of such reservations.

33. Participants also discussed the issue of reservations to provisions setting forth a rule of *jus cogens*. Some were of the view that any reservation to that type of clause should automatically be considered invalid, since it would inevitably affect the "quintessence" of the treaty. Others observed that the problem arose in much the same way that it did for reservations to provisions setting forth a customary norm — which could not be considered to be invalid *ipso jure*.

(d) Assessment of validity

34. All participants agreed that the competence of the human rights bodies to assess the validity of reservations was unquestionable. Many welcomed their reliance on political means of persuasion rather than on legal imperatives in their interactions with States.

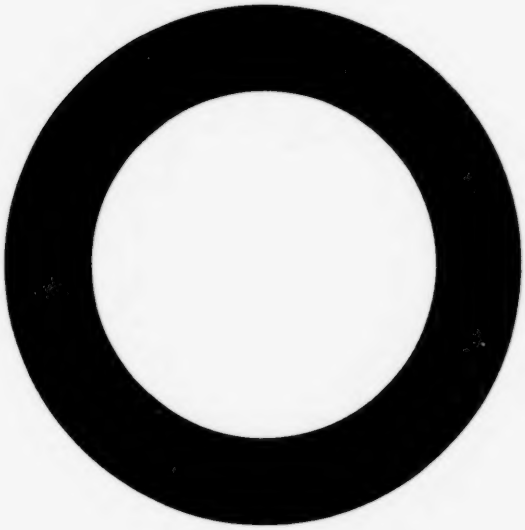
35. The discussion focused in particular on the issue of the "reservations dialogue". It was observed that, in practice, such an approach was extremely useful for understanding the political considerations underlying reservations and that the pragmatism and discretion exercised by the human rights bodies had already met with success.

(e) The consequences of non-validity

36. To date, the human rights bodies had endeavoured, insofar as possible, to avoid taking a position on the validity of reservations. Examples of assessments of validity or declarations of invalidity of reservations were the exception and had

occurred only in the rare cases in which such determinations were unavoidable. In any event, the consequences of the non-validity of a reservation were not obvious. The participants were unanimous in considering that a reservation that was incompatible with the object and purpose of a treaty was null and void. However, some disagreement was voiced as to whether there was any need for States to rule on that matter, and it was considered unnecessary for States to object to an invalid reservation. Conversely, several participants felt that States had an interest in taking a position owing both to a lack of monitoring bodies in certain areas or, where such bodies did exist, to the sometimes random manner in which they considered the matters referred to them.

37. The consequences of the non-validity of a reservation for the status of the treaty presented a major difficulty, one which was linked, more specifically, to the consent of the author of the reservation to be bound by the treaty. The problem lay in determining whether or not the invalid reservation was severable from consent to be bound by the treaty. The participants stressed that the human rights bodies must act with caution. Their approach consisted in determining the State party's intention. If intention could not be discerned, a presumption would have to be made. In the view of several speakers, such a presumption should be in favour of severing the invalid reservation from consent to be bound by the treaty and firmly maintained by the human rights bodies (with the understanding that it must not constitute a conclusive presumption). Other participants, however, believed that the principle of State sovereignty must prevail. A reservation that was declared invalid altered the scope of the treaty for the reserving State, which should then have the option of withdrawing its consent to be bound by the treaty. Some participants pointed to the dangers inherent in the severance of an invalid reservation and considered that there was a risk that the reserving State might withdraw its participation in the optional protocol, or even in the treaty. According to one opinion, however, experience had shown that risk to be quite small.



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Geneva, 4 May-5 June and 6 July-7 August 2009

Fourteenth report on reservations to treaties

By Alain Pellet, Special Rapporteur

Corrigendum

1. **Paragraph 76, draft guideline 2.4.0:**

For made in writing *read* formulated in writing

2. **Paragraph 76, draft guideline 2.4.3 bis:**

For should be made *read* should be communicated

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Second report on the protection of persons in the event of disasters

by Eduardo Valencia-Ospina, Special Rapporteur

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I. Introduction*

1. The present report on the protection of persons in the event of disasters is preceded by a preliminary report on the same topic,[1] submitted by the Special Rapporteur at the sixtieth session of the International Law Commission in May 2008, following the Commission's decision at its fifty-ninth session in 2007,[2] to include the topic in its current programme of work.

2. The preliminary report dealt in a general way with the scope of the topic, in order to properly circumscribe it.[3] To that effect, it presented a broad outline of the most relevant legal questions involved, clustering the discussion around three axes: *ratione materiae* (including the concept and classification of disasters[4] and the concept of protection of persons[5]), *ratione personae*[6] and *ratione temporis*.[7] Of special interest was the possibility of a rights-based approach to the topic, which the Special Rapporteur examined without prejudice to the outcome of further debates.[8] Applicable sources of law for international disaster protection and assistance were also assessed,[9] and some preliminary ideas regarding the appropriate final form of the work were presented.[10]

3. The preliminary report was considered by the Commission at its 2978th to 2982nd meetings, in July 2008.[11] Discussion among members of the Commission focused on the advantages and challenges featured by a rights-based approach to the topic.[12] The appropriate limits of its scope were also thoroughly discussed in reference to the three mentioned axes,[13] as was the right to humanitarian assistance as an important element to be considered in subsequent stages of the debates.[14]

4. The Commission gave attention to the notion of "responsibility to protect", whose relevance for the present topic remained unclear for some members, particularly in the context of disasters.[15] Sources relevant to the consideration of the topic were finally examined, highlighting the importance for the Commission's work of not duplicating prior work on the topic done elsewhere,[16] for example, the

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* The Special Rapporteur expresses his appreciation to the following for their assistance in the preparation of the present report: Arjen Vermeer, Ph.D candidate, T.M.C. Asser Institute, The Hague; René Urueña, Ph.D candidate, and J. Benton Heath, J.D. candidate, Law School of New York University, New York.

[1] A/CN.4/598.

[2] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 375.

[3] A/CN.4/598, para. 9.

[4] Ibid., paras. 44-49.

[5] Ibid., paras. 50-55.

[6] Ibid., para. 56.

[7] Ibid., paras. 57 and 58.

[8] Ibid., paras. 12, 26 and 51.

[9] Ibid., paras. 21-42.

[10] Ibid., paras. 59 and 60.

[11] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 216.

[12] Ibid., paras. 227-229.

[13] Ibid., paras. 230-240.

[14] Ibid., paras. 241-246.

[15] Ibid., paras. 247-250, esp. 248.

[16] Ibid., paras. 251-256.

Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, adopted by the International Federation of Red Cross and Red Crescent Societies (IFRC) at its 30th Conference in 2007.[17]

5. In October and November 2008, at the sixty-third session of the General Assembly, the Sixth Committee further considered the preliminary report and the debate held thereon in the Commission. In connection with the discussion of chapter IX of the Commission's report on the work of its sixtieth session (A/63/10), more than 20 States and IFRC presented their views on the issues put forward by the Special Rapporteur's report. All delegations shared the view of the Special Rapporteur on the importance and timeliness of the general undertaking, and all agreed on the topic's particular complexities, which warrant special care in its treatment by the Commission. A provisional understanding was reached regarding the final outcome of the work: while some States favoured non-binding guidelines,[18] there was no objection to the suggestion that work should proceed in the form of draft articles, whose ultimate binding force could be decided at a later stage.

6. A similar understanding emerged with regard to some limitations of the scope *ratione materiae*. The exclusion of armed conflict from the subject matter to be studied was supported by all delegations that referred to the issue.[19] Likewise, to draw a strict line between man-made and natural disasters seemed unnecessary to various delegations, particularly if both causes would produce similar effects.[20] Nonetheless, some of those delegations proposed that, as a question of methodology, work could start by considering natural disasters and then move on to other types of disaster.[21]

7. Limitations on the scope *ratione temporis* were also discussed in the Sixth Committee. In various interventions,[22] the idea was put forward of limiting, in principle, the Commission's work to two phases of a disaster situation: the disaster proper (response) and post-disaster (early recovery), without prejudice as to the further consideration of issues of preparedness at the pre-disaster phase in the future.

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[17] Available at www.ifrc.org/what/disasters/idrl/advocacy/guidelines.asp.

[18] For example, Germany (A/C.6/63/SR.22, para. 60), India (A/C.6/63/SR.23, para. 21) and the United Kingdom (A/C.6/63/SR.23, para. 64).

[19] For example, Finland (on behalf of the Nordic States) (A/C.6/63/SR.22, para. 54), India (A/C.6/63/SR.23, para. 19), Japan (A/C.6/63/SR.23, para. 41), Republic of Korea (A/C.6/63/SR.23, para. 24), Poland (A/C.6/63/SR.24, para. 55), Spain (A/C.6/63/SR.23, para. 37) and the United Kingdom (A/C.6/63/SR.23, para. 63).

[20] For example, Austria (A/C.6/63/SR.23, para. 7), Chile (A/C.6/63/SR.22, para. 14), Finland (on behalf of the Nordic States) (A/C.6/63/SR.22, para. 54), France (A/C.6/63/SR.24, para. 81), Germany (A/C.6/63/SR.22, para. 60), Greece (A/C.6/63/SR.24, para. 6), Republic of Korea (A/C.6/63/SR.23, para. 24) and the United Kingdom (A/C.6/63/SR.23, para. 63). See also Argentina (A/C.6/63/SR.24, para. 64) (drawing a sharp line between natural and man-made disasters would be difficult).

[21] For example, Japan (A/C.6/63/SR.23, para. 41), Republic of Korea (A/C.6/63/SR.23, para. 24), Mexico (A/C.6/63/SR.23, para. 61), Portugal (A/C.6/63/SR.25, para. 6) and Spain (A/C.6/63/SR.23, para. 37).

[22] For example, Austria (A/C.6/63/SR.23, para. 9), France (A/C.6/63/SR.24, para. 80), Republic of Korea (A/C.6/63/SR.23, para. 24) and New Zealand (A/C.6/63/SR.24, para. 11).

8. Finally, a rights-based approach to the topic was supported by various delegations,[23] while some expressed doubts as to whether such was the correct path to be followed in this case.[24] Similarly, while the relevance of a "responsibility to protect" still remained unclear for several delegations,[25] some delegations considered that the Commission should not find itself prevented from considering that notion, should the logic of its undertaking propel it in that direction.[26]

9. In the report on the work of its sixtieth session, the Commission indicated that it would welcome any information concerning the practice of States under this topic, including examples of domestic legislation. It would welcome in particular information and comments on specific legal and institutional problems encountered in dealing with or responding to disasters.[27] Replies to the Commission's concern were given orally by El Salvador in its statement in the Sixth Committee[28] and in writing by Mexico on 5 November 2008 and Germany on 26 February 2009. The written replies have been circulated as internal documents of the Commission.

10. Also at its sixtieth session, the Commission decided to pose a question to the United Nations system, in the following terms:

> How has the United Nations system institutionalized roles and responsibilities, at global and country levels, with regard to assistance to affected populations and States in the event of disasters — in the disaster response phase but also in pre- and post-disaster phases — and how does it relate in each of those phases with actors such as States, other intergovernmental organizations, the Red Cross movement, non-governmental organizations, specialized national response teams, national disaster management authorities and other relevant actors?[29]

The Commission likewise decided to seek information from IFRC on the basis of a similar inquiry adjusted as appropriate.[30]

11. By letters dated 6 November 2008 the Secretary of the Commission transmitted the question to the two addressees. Replies were received on 10 March 2009 from IFRC and on 17 April from the Office for the Coordination of Humanitarian Affairs of the Secretariat. These replies have been circulated as internal documents of the Commission.

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[23] For example, Chile (A/C.6/63/SR.22, para. 16), Finland (on behalf of the Nordic States) (A/C.6/63/SR.22, para. 53), France (A/C.6/63/SR.24, para. 81), Poland (A/C.6/63/SR.24, para. 55), Portugal (A/C.6/63/SR.25, para. 6), Spain (A/C.6/63/SR.23, para. 37) and Thailand (A/C.6/63/SR.23, para. 90). See also Austria (A/C.6/63/SR.23, para. 10) (elements of human rights law will have a bearing on the topic).

[24] For example, China (A/C.6/63/SR.23, para. 29), New Zealand (A/C.6/63/SR.24, para. 11) and the Netherlands (A/C.6/63/SR.22, para. 62).

[25] For example, China (A/C.6/63/SR.23, para. 31), India (A/C.6/63/SR.23, para. 20) and Japan (A/C.6/63/SR.23, para. 42).

[26] For example, Finland (on behalf of the Nordic States) (A/C.6/63/SR.22, para. 55), Poland (A/C.6/63/SR.24, para. 53) and Portugal (A/C.6/63/SR.25, para. 6).

[27] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 31.

[28] A/C.6/63/SR.23, paras. 56 and 57.

[29] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 32.

[30] Ibid., para. 33.

12. During the sixtieth session of the Commission and afterwards, the Special Rapporteur continued his contacts with representatives of interested governmental and non-governmental organizations. He met in July of 2008 with Sálvano Briceño, Director of the Inter-Agency Secretariat of the International Strategy for Disaster Reduction (ISDR). He also held a separate meeting with the Office for the Coordination of Humanitarian Affairs, chaired by Dusan Zupka (Emergency Preparedness Section) and attended by 14 officials of the Office; a meeting with IFRC chaired by Ibrahim Osman, Deputy Secretary-General, and attended by six Federation officials; and a meeting with the Protection Cluster Working Group chaired by Walter Kälin, Representative of the Secretary-General on human rights of internally displaced persons and attended by four other members of the Working Group, mainly officials from the Office of the United Nations High Commissioner for Refugees (UNHCR).

13. For the benefit of the Special Rapporteur, a round-table meeting on the topic was convened in Geneva in December 2008, presided over by the Representative of the Secretary-General on human rights of internally displaced persons and attended by 14 officials from his office, the Office of the High Commissioner for Human Rights, IFRC, the Office for the Coordination of Humanitarian Affairs, UNHCR, the United Nations Children's Fund and members of the Protection Cluster Working Group.

Recent developments

14. In the period following the end of the Commission's sixtieth session, a number of documents have been issued that are of relevance to the consideration of the present topic. They include:

(a) The report of the independent expert on human rights and international solidarity submitted to the Human Rights Council by the High Commissioner for Human Rights;[31]

(b) The *Manual on International Law and Standards Applicable in Natural Disaster Situations* prepared and published by the International Development Law Organization. As explained in the foreword, the Manual provides a comprehensive analysis of the international legal standards pertaining to five key aspects of disaster response: human rights, the rights of vulnerable groups, the rights of children, land and property management and anti-corruption/funds management;

(c) The report of the Secretary-General on implementing the responsibility to protect.[32] Referring to paragraphs 138 and 139 of the 2005 World Summit Outcome,[33] the report explains in paragraph 10 (b) that "[t]he responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility".

[31] A/HRC/9/10.

[32] A/63/677.

[33] General Assembly resolution 60/1 of 16 September 2005.

II. Defining the scope of the topic

15. The valuable guidance of the Commission and the Sixth Committee allows the Special Rapporteur to advance with the definition of the topic's scope. Once again, to facilitate the discussion, three aspects of scope are treated below: *ratione materiae*, *ratione personae* and *ratione temporis*.

A. *Ratione materiae*

1. Rights and needs in the protection of persons in the event of disasters

16. An important aspect of the preliminary report and the debate that ensued was the scope to be given to the protection of persons in the present undertaking, specifically in relation to the "rights-based" approach to the topic. "Rights-based" approaches emerged during the late 1980s as a conceptual change from previous paradigms of development studies.[34] The shift of language implied that development policy could and should be seen as a matter of rights, thus orienting the established regulatory and judicial machinery of human rights towards the achievement of development goals. As a result, rights standards would become crucial criteria to assess development agendas and, perhaps more importantly, rights-based reasoning would become an important part of the conceptual framework for understanding development policy.[35]

17. Rights-based approaches have, since then, expanded as a methodology for understanding the most varied aspects of development. More than a normative statement with claims of exclusivity, the approach is a useful departing position that carries the all-important baggage of rights-based language, and needs to be complemented by other views of relevance to the specific subject matter to be understood. IFRC has suggested that a rights-based approach to the topic may be complemented by considering the relevance of needs in the protection of persons in the event of disasters.[36] The Special Rapporteur believes that such an exercise can be usefully undertaken in this context. There is no stark opposition between needs and a rights-based approach to the protection of persons in the event of disasters. On the contrary, a reasonable, holistic approach to the topic seems to require that both rights and needs enter the equation, complementing each other when appropriate.

18. One further rationale to be considered when defining the scope of the topic is risk. Risk management is a crucial consideration that informs all aspects of disaster policy,[37] and it is possible to understand it in reference to two different moments of the disastrous event: first, risk as a fundamental element of disaster prevention and, second, risk as a variable in the protection of persons at the disaster proper and post-disaster phases. ISDR in Geneva is currently working for increased awareness of the importance of disaster reduction as an integral component of sustainable development.[38] In order to avoid unnecessary duplication of efforts, it seems

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[34] Debates in development studies led in 1986 to the first formal evidence of a paradigm shift, with the adoption of the Declaration on the Right to Development (General Assembly resolution 41/128, annex).

[35] See P. Uvin, *Human Rights and Development* (Kumarian Press, 2004), p. 165.

[36] A/C.6/63/SR.22, para. 68.

[37] See: ISDR, "*Living with risk: a global review of disaster reduction initiatives*", 2004.

[38] See www.unisdr.org.

reasonable to the Special Rapporteur that the Commission should at the present stage follow the efforts of ISDR on disaster prevention, leaving a risk-informed paradigm for later debates on disaster preparedeness.

2. The dual nature of the protection of persons in the event of disasters

19. In his preliminary report, the Special Rapporteur concluded, inter alia, that "[w]ork on the topic can be undertaken with a rights-based approach that will inform the operational mechanisms of protection" (A/CN.4/598, para. 62). In this connection, the Special Rapporteur notes that the kind of international regulation that would constitute a significant contribution to the subject matter can be usefully understood in reference to two different axes: the rights and obligations of States in relation to one another; and the rights and obligations of States in relation to persons in need of protection.

20. The notion that these two axes are intimately linked to, yet conceptually distinct from, one another is not new in international law. A case in point is the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, whereby the Contracting Parties undertake obligations to one another, yet whose ultimate beneficiaries are human beings. In giving its advisory opinion on *reservations to the Convention*, the International Court of Justice identified with clarity the premise that informs the Special Rapporteur's approach, by holding:

> The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.[39]

21. This premise has also informed further interpretation of the Genocide Convention. Under article 1, the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish. While both the perpetrators and victims of the crime are likely to be individuals, they are not direct subjects of the Convention. And yet, it seems hard to understand the legal regime established by the Convention if individuals are not included in the reasoning. An expression of this tension appeared in the Bosnia and Herzegovina *v.* Serbia and Montenegro judgment of 26 February 2007,[40] where the Respondent argued that the condition sine qua non for establishing State responsibility for the crime of genocide is the prior establishment, according to the rules of criminal law, of the individual responsibility

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[39] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951*, p. 15, at p. 23.

[40] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007.

of a perpetrator engaging the State's responsibility. The Court, mindful of the distinction between the two axes presented here, held:

> The different procedures followed by, and powers available to, this Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide or the other acts enumerated in Article III have been committed
>
> [...]
>
> Any other interpretation could entail that there would be no legal recourse available under the Convention in some readily conceivable circumstances: genocide has allegedly been committed within a State by its leaders but they have not been brought to trial because, for instance, they are still very much in control of the powers of the State including the police, prosecution services and the courts and there is no international penal tribunal able to exercise jurisdiction over the alleged crimes; or the responsible State may have acknowledged the breach. The Court accordingly concludes that State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one.[41]

22. A parallel situation is that of article 36 of the 1963 Vienna Convention on Consular Relations, which provides certain rights and obligations with a view to facilitating the exercise of consular functions relating to nationals of the sending State. Specifically, article 36 (1) (b) provides that:

> if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.
>
> [...]
>
> 2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

23. In the *LaGrand* decision, the International Court of Justice considered whether the reference to "rights" in the foregoing provision "applies only to the rights of the sending State and not also to those of the detained individual",[42] and concluded that "Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State, and that consequently the reference to 'rights' in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual".[43] The Special Rapporteur

[41] Ibid., paras. 180 and 181.

[42] *LaGrand Case (Germany v. United States of America), Judgment, ICJ Reports 2001*, p. 466, para. 89.

[43] Ibid.

notes that the Court understood article 36 in reference to two different axes: on the one hand, rights and obligations of States in relation to one another; and on the other, the rights and obligations of States in relation to the individual detainee. Such an approach is the one followed by the Special Rapporteur concerning the protection of persons in the event of disasters.

24. This approach was taken by the International Court of Justice in the *Avena and other Mexican Nationals* judgment.[44] When addressing the adequate reparations for the violation of article 36, the Court drew a difference between the obligations among Contracting Parties and the obligations in relation to an individual detainee.[45] Following this differentiation, the Court concluded, "the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts (...) with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice".[46]

25. Approaching a subject in consideration of the two axes referred to above does not imply any prior assessment of the status of the rights and obligations clustered around each axis. In the *Avena and other Mexican Nationals* decision, the International Court of Justice pondered whether the right of consular notification and communication was to be considered a fundamental human right. The Court held that it was unnecessary for it to decide on the status of that right: "Whether or not the Vienna Convention rights are human rights is not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the *travaux preparatoires*, support the conclusion that Mexico draws from its contention in that regard".[47]

26. The approach adopted in the present report is also present in the practice of the Dispute Settlement Body of the World Trade Organization (WTO). A case in point is the panel report in the case of *United States — Sections 301-310*,[48] where the panel analysed the implications of a certain domestic legal act for the application of article 23.1 of the Dispute Settlement Understanding. The panel considered the issue by seeking to identify the objects and purposes of the Dispute Settlement Understanding, and WTO more generally, that are relevant to a construction of article 23. For the panel, the most relevant were "those which relate to the creation of market conditions conducive to individual economic activity in national and global markets and to the provision of a secure and predictable multilateral trading system".[49] The panel noted that these goals are only achievable through the actions of private actors, which are not part of the multilateral trading regime, as "the GATT/WTO did *not* create a new legal order the subjects of which comprise both contracting parties or Members and their nationals".[50] However, for the panel,

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[44] *Case concerning Avena and other Mexican Nationals (Mexico v. United States), Judgment, ICJ Reports 2004*, p. 12.

[45] Ibid., paras. 121 and 122.

[46] Ibid., para. 121.

[47] Ibid., para. 124.

[48] *United States — Sections 301-310 of the Trade Act of 1974*, panel report, document WT/DS152/R (22 December 1999).

[49] Ibid., para. 7.71.

[50] Ibid., para. 7.72 (emphasis in the original).

> [I]t would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.[51]

27. Such reasoning, and the aforementioned examples, reflect the approach adopted by the Special Rapporteur with regard to the protection of persons in the event of disasters. Firstly, rights and obligations of States in relation to one another may be discussed, in order to define at a later stage the rights and obligations of States in relation to persons in need of protection.

B. *Ratione personae*: States and non-State actors

28. Post-disaster relief commonly involves the participation of numerous actors, including several governmental agencies, the military, international and domestic non-governmental organizations, IFRC, national Red Cross and Red Crescent societies and the private sector. Through its Guidelines (see para. 4 above), IFRC has already made a substantial contribution to the domestic legal regime applicable to several of these actors, as it tries to improve the domestic legal, policy, and institutional frameworks concerning international disaster relief and initial recovery assistance.[52] In that context, defining a new, comprehensive legal framework for all actors involved in a post-disaster response would seem unnecessary, for it could overlap with work already done in the Guidelines. Moreover, and as significantly, such an effort would exceed what may be plausibly asked from the present undertaking. It seems, thus, of importance to prioritize the addressees of the Commission's work on the topic. The Special Rapporteur is of the opinion, prima facie, that the Commission could usefully start by focusing its efforts on rights and duties of States for guaranteeing the protection of persons in the event of disasters. This would be without prejudice to specific provisions that the Commission would discuss at a later stage, applicable to non-State actors.

C. *Ratione temporis*: Pre-disaster, disaster proper and post-disaster action

29. Intimately related to the prior points is the limitation of the topic *ratione temporis*. During the discussions in the Sixth Committee, a number of delegates suggested that work on the topic could be limited to the disaster proper and post-disaster phases.[53] Disaster risk reduction features an agenda that, according to the Hyogo Framework for Action, includes providing frameworks to (a) ensure that disaster risk reduction is a national and a local priority with a strong institutional basis for implementation; (b) identify, assess and monitor disaster risks and enhance early warning; (c) use knowledge, innovation and education to build a culture of

[51] Ibid., para. 7.73.

[52] See Guidelines, note 17 above, para. 3.

[53] See note 22 above.

safety and resilience at all levels; (d) reduce the underlying risk factors; and, (e) strengthen disaster preparedness for effective response at all levels.[54] The scope of these tasks could be overly ambitious to be appropriately covered in the present stage of work on the topic and may undermine more limited (yet relevant) contributions by the Commission to the protection of persons in the event of disasters. However, preparedness or action prior to the disaster should actively enhance the protection of persons in the ulterior phases. The Special Rapporteur is of the opinion that the way to reconcile such complementary needs is to follow the cited members' suggestion for the present phase of the work, and limit the scope of this topic, *ratione temporis*, to the disaster proper and post-disaster phases. This is without prejudice to the Commission addressing, at a later stage, preparedness at the pre-disaster phase.

30. Having considered the foregoing, it is possible to propose the following wording for a draft article on the scope of the draft articles:

Draft article 1
Scope

The present draft articles apply to the protection of persons in the event of disasters, in order for States to ensure the realization of the rights of persons in such an event, by providing an adequate and effective response to their needs in all phases of a disaster.

D. Defining disaster

31. The Special Rapporteur notes that "disaster" is not a term of art and, as such, lacks one single accepted definition; consequently, as noted in the preliminary report (A/CN.4/598), some international instruments have forgone a definition altogether.[55] Yet, a definition seems of essential importance in the present context. Such a definition will help identify the situations in which protection may or shall be invoked, as well as the circumstances under which protection will no longer be necessary. Describing the contours of "disaster" will also help identify the persons in need of protection and thus ascertain who is entitled to protection. A definition should also fix reasonable limits on the scope of the topic, excluding events such as armed conflict.

32. The term "disaster" has been defined through two different methodologies in international law. The first is a specific approach, which does not dwell in an abstract definition of the term but understands it as a specific kind of event that warrants emergency treatment in and of itself. Following this approach, the question of whether an event falls under the definition of "disaster" becomes moot. That is the case of the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency,[56] which avoids a definition of "disaster" but establishes the kind of cooperation to be undertaken by the Contracting Parties in case of a

[54] Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters (A/CONF.206/6 and Corr.1, chap. I, resolution 2), para. 14.

[55] See, for example, the Inter-American Convention to Facilitate Disaster Assistance of the Organization of American States. Opened for signature on 7 June 1991. Entered into force on 16 October 1996.

[56] United Nations, *Treaty Series*, vol. 1457, No. 24643.

nuclear accident or radiological emergency, events that are deemed to be disasters in and of themselves.

33. The second alternative is a broader definition of disaster, not restricted to a single kind of event. Considering that the topic is framed so as not to address the protection of persons in a specific hypothesis of disaster, but rather to codify and develop rules or guidelines that may be usefully applicable to all kinds of disasters, it seems appropriate to opt for this second methodology, that is, to propose a general definition establishing the necessary elements that characterize an event as a "disaster". To this effect, a good point of departure is the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations,[57] pointed out by the Finnish delegation in the Sixth Committee,[58] whose article 1.6 provides that

> "Disaster" means a serious disruption of the functioning of society, posing a significant, widespread threat to human life, health, property or the environment, whether caused by accident, nature or human activity, and whether developing suddenly or as the result of complex, long-term processes.

The same definition was used by IFRC in its Guidelines, though excluding armed conflicts.[59] This definition, including the latter caveat, provides a good basis at the start of work on the present topic.

34. Building on this basis, several aspects of the foregoing definition deserve the Commission's attention. The first refers to the requirement of harm (or lack thereof) in the definition of disaster: would the mere threat to human life be enough to consider an event a disaster? The Framework Convention on Civil Defence Assistance, for example, requires only threatened losses, defining in article 1 (c) disaster as "an exceptional situation in which life, property or the environment may be at risk".[60] A possible alternative would be to consider language that requires the existence of actual losses in the definition of disaster. An example of the latter may be the "Internationally agreed glossary of basic terms related to Disaster Management", developed by the Department of Humanitarian Affairs of the United Nations in 1992,[61] which defines disaster as:

> A serious disruption of the functioning of society, causing widespread human, material or environmental losses which exceed the ability of [the] affected society to cope using only its own resources. Disasters are often classified according to their cause (natural or man-made).

35. In addition to foreseeing actual losses, this definition and others require that the disaster overwhelm the affected region's response capacity. Another example of such a requirement may be found in the Agreement Establishing the Caribbean Disaster Emergency Response Agency:[62]

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[57] Available at www.reliefweb.int/telecoms/tampere/index.html.

[58] A/C.6/63/SR.22, para. 54.

[59] See section 2.1 of the Guidelines, note 17 above.

[60] Framework Convention on Civil Defence Assistance, United Nations, *Treaty Series*, vol. 2172, No. 38131.

[61] Document DHA/93/36 (1992), available at www.reliefweb.int/rw/lib.nsf/db900sid/CGEL-5EQNZV.

[62] Available at www.cdera.org/about_cdera_agreement.php.

> "Disaster" means a sudden event attributable directly and solely either to the operation of the forces of nature or to human intervention or to both of them and characterized by widespread destruction of lives or property accompanied by extensive dislocation of public services, but excluding events occasioned by war, military confrontation or mismanagement.

36. Moreover, the Tampere definition includes a reference to the causal element of disasters, in order to underscore that the definition covers both man-made and natural events. Reference to causation in the definition of "disaster" may fail to consider the problem of complex causation — that is, the problem that one condition can hardly be described as being the only and sufficient cause of a given consequence.[63] This obstacle seems of crucial importance today more than ever, when natural phenomena merge with human agency in the complex birth and expansion of disastrous events.[64] In this context, explicit reference to causation may be unnecessary in a definition of disaster. The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief,[65] for example, does not employ a causal element, defining disaster as "a calamitous event resulting in loss of life, great human suffering and distress, and large-scale material damage".

37. This point leads to a more general conclusion. Several delegations in the Sixth Committee suggested that the definition of disaster may be usefully restricted to the impact of the event, and not necessarily to its origins.[66] This suggestion points in the correct direction. It seems of limited use to insist on a strict separation between natural and man-made disasters when, on the one hand, it is singularly difficult to establish a clear causal relation and, on the other, such a test would not imply a substantive contribution to the definition of the term. That is, though, without prejudice to the use of said distinction in contexts other than the definition of disaster, as the Commission may find useful or necessary in its future work.

38. Furthermore, the present topic relates specifically to protection of persons in the event of disasters. The Tampere and most other definitions include threat of harm not only to persons, but also to property and the environment. Should the definition of disaster in the present report be limited to loss of human life or health? That would not appear to be the case. While, as it currently stands, the topic is limited to the protection of persons, losses amounting to a disaster that would trigger such protection are not thus limited. An environmental disaster calls for the protection of persons for, in the words of the International Court of Justice, "the

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[63] In Hume's words, causation "belongs entirely to the soul which considers the union of two or more objects in all past instances" (D. Hume, *Treatise of Human Nature* (1978 [1739]),166). On the problematic relation between causes and conditions, see generally J. S. Mill, *A System of Logic Ratiocinative and Inductive, Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation*, Book III, Ch. V, § 3 [1843], in *The Collected Works of John Stuart Mill*, ed. J. M. Robson (1974), VII, at p. 327. On the same problem in legal reasoning, see H. L. A. Hart and T. Honoré, *Causation in the Law* (1985), at II.

[64] See, generally, U. Beck, *Risk Society: Towards a New Modernity* (1992), p. 21; A. Giddens, *Affluence, Poverty and the Idea of a Post-scarcity Society, UNRISD Discussion Paper No. 63* (1995), at p. 4.

[65] Annex VI to the report entitled "Principles and response in international humanitarian assistance and protection", document 95/C.II/2/1, 26th International Conference of the Red Cross and Red Crescent, Geneva, 3-7 December 1995.

[66] See note 20 above.

environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn".[67] Similarly, widespread material destruction could also warrant protection of persons. Drawing strict conceptual lines in the context of disastrous situations may be undesirable, as material and environmental losses are inextricably linked to human life and health, warranting, as a unit, the protection of persons in the aftermath of a disaster. While this seems clear in the context of a definition, in view of the topic's limitation it remains subject to guidance by the Commission whether further work should assess in detail the protection of property or the environment in the event of a disaster.

39. Among the instruments that do not limit their definitions of disaster to those that directly affect human life or health is the Charter on Cooperation to Achieve the Coordinated Use of Space Facilities in the Event of Natural or Technological Disasters (also known as the International Charter on Space and Major Disasters).[68] Article I of the Charter states:

> The term "natural or technological disaster" means a situation of great distress involving loss of human life or large-scale damage to property, caused by a natural phenomenon, such as a cyclone, tornado, earthquake, volcanic eruption, flood or forest fire, or by a technological accident, such as pollution by hydrocarbons, toxic or radioactive substances.

40. It should be noted that the International Charter on Space and Major Disasters also includes a detailed contemplation of the causes of disasters. Similarly, the Framework Convention on Civil Defence Assistance, an instrument intended to promote effective disaster prevention and crisis management, deals with environmental and material threats, but does not include a causal element:

> "Disaster" is an exceptional situation in which life, property or the environment may be at risk. [69]

41. The Red Cross/Red Crescent code of conduct, issued in 1995, appears to take a much more restrictive approach, requiring both loss of life and material damage. The code defines disaster as

> a calamitous event resulting in loss of life, great human suffering and distress, and large scale material damage.[70]

42. An alternate approach embraces disasters that cause either loss of life, property damage or environmental degradation, but contains an additional restrictive requirement that the event be of such scale that the local community is incapable of adequately responding. Consider a definition of natural disaster offered by the Operational Guidelines on Human Rights and Natural Disasters adopted by the Inter-Agency Standing Committee:

> "Natural disaster" refers to the consequences of events triggered by such natural hazards as earthquakes, volcanic eruptions, landslides, tsunamis, floods and drought that overwhelm local response capacity. Such disasters seriously disrupt the functioning of a community or a society causing widespread

[67] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, p. 241, para. 29.

[68] Available at www.disasterscharter.org/.

[69] See Framework Convention on Civil Defence Assistance, note 60 above.

[70] See note 65 above.

human, material, economic or environmental losses, which exceed the ability of the affected community or society to cope by using its own resources.[71]

43. ISDR has adopted similar language in its own definition, defining disaster as

> a serious disruption of the functioning of a community or a society causing widespread human, material, economic or environmental losses which exceed the ability of the affected community or society to cope using its own resources.[72]

44. After reviewing such definitions, among others, the Special Rapporteur is of the opinion that the Tampere Convention appears to provide the best guidance for this topic. The convention's definition considers natural and man-made phenomena and acknowledges the reality that disasters often result from a complex web of factors, where no single sufficient cause may be identified. In addition, the convention's definition includes events that threaten not only human life, but also property and the environment. As noted above, each of such threats is severe enough to give rise to a need for protection.

45. Considering the foregoing, it seems possible to conclude this section with the following draft language of a definition of disaster:

Draft article 2
Definition of disaster

> "Disaster" means a serious disruption of the functioning of society, excluding armed conflict, causing significant, widespread human, material or environmental loss.

46. This definition adopts the basic characterization of disaster as a "serious disruption", a term employed by the Tampere Convention of 1998 and other recent definitions.[73] This usage reflects the general understanding that the threshold in determining the existence of a disaster should be the degree of dysfunction of the society in which it occurs. This definition does not, however, demand that the event "overwhelm a society's response capacity".[74] Such a requirement would shift the present topic's focus from the persons in need of protection.

47. Moreover, the Special Rapporteur underscores that some actual loss is required, as opposed to the mere threat of harm. This sits most comfortably with the common understanding of disaster as a calamitous event, and it refers to those situations that would call for the protection of persons. The type of harm, however, is not limited to loss of life or health, reflecting the fact that severe environmental degradation or property damage will warrant certain protections.

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[71] Brookings-Bern Project on Internal Displacement, *Human Rights and Natural Disasters: Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disaster* (2008).

[72] ISDR, UNISDR *Terminology on Disaster Risk Reduction*, available at www.unisdr.org/eng/library/ UNISDR-terminology-2009-eng.pdf.

[73] See IFRC, note 17 above, and Department of Humanitarian Affairs definition, note 61 above. See also the International Charter on Space and Major Disasters ("situation of great distress") note 68 above, and the Agreement Establishing the Caribbean Disaster Emergency Response Agency ("accompanied by extensive dislocation of public services"), note 62 above.

[74] See Brookings-Bern Project, note 71 above. See also Department of Humanitarian Affairs, note 61 above.

48. Similarly, the definition does not distinguish between natural and man-made events, recognizing that disasters often arise from complex sets of causes that may include both wholly natural elements and contributions from human activities. Armed conflicts are expressly excluded, with the understanding that a well-developed body of law exists to cover such situations.

49. Finally, the definition excludes an inquiry into causation. Disasters generally arise from a complex set of factors, making virtually impossible any effort to identify a single sufficient cause. Furthermore, in light of this topic's focus on protection of persons, the inquiry into a calamity's root cause is immaterial. The disruption itself, not the originating causal phenomena, gives rise to the need for protection. This definition, focusing on the disruption and its particular harms, builds the most appropriate framework to explore the rights and obligations relating to protection of persons.

III. Solidarity and cooperation

50. The underlying principles in the protection of persons in the event of disasters are those of solidarity and cooperation, both among nations and among individual human beings. It is in the solidarity inspired by human suffering that the Commission's mandate finds *telos*, as an expression of our common heritage in a global context.

51. In such a context, effective international cooperation is indispensable for the protection of persons in the event of disasters. As has been observed by the Secretary-General,

> [t]he belief in the dignity and value of human beings as expressed in the preamble of the Charter of the United Nations is and must be the prime motive for the international community to give humanitarian assistance. The concept of international solidarity so often evoked following major emergencies and understood as a feeling of responsibility towards people in distress equally has its roots in the ethical principles of the Charter. Solidarity in this sense is not charity.[75]

More recently, the independent expert on human rights and international solidarity held that:

> [i]nternational solidarity and international cooperation are based on the foundation of shared responsibility. In the broadest sense, solidarity is a communion of responsibilities and interest between individuals, groups and States, connected by the ideal of fraternity and the notion of cooperation. The relationship between international solidarity and international cooperation is an integral one, with international cooperation as a core vehicle by which collective goals and the union of interests are achieved.[76]

[75] A/45/587, para. 5.

[76] A/HRC/9/10, para. 6. See also resolution 46/182 of 19 December 1991, operative para. 5.

An expression of the principle of solidarity can be found in the 2005 Hyogo Declaration:

> We are determined to reduce disaster losses of lives and other social, economic and environmental assets worldwide, mindful of the importance of international cooperation, solidarity and partnership, as well as good governance at all levels.[77]

52. The duty to cooperate is well established as a principle of international law and can be found in numerous international instruments. The Charter of the United Nations enshrines it, not least with reference to the humanitarian context in which the protection of persons in the event of disasters places itself.[78] Article 1(3) of the Charter clearly spells out as one of the purposes of the Organization:

> To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

Articles 55 and 56 of the Charter elaborate on Article 1(3) with respect to international cooperation. Article 55 of the Charter reads:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> a. higher standards of living, full employment, and conditions of economic and social progress and development;
>
> b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 of the Charter reads:

> All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

53. The general duty to cooperate was reiterated as one of the principles of international law in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations in the following terms:

> States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the

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[77] A/CONF.206/6 and Corr.1, chap. I, resolution 1, fifth preambular paragraph.

[78] See A/CN.4/590, para. 17 and note 57.

general welfare of nations and international cooperation free from discrimination based on such differences.[79]

As interpreted by one author, this obligation "consecrat[es] the solidarity of nations".[80]

54. Solidarity as an international legal principle, and distinct from charity, gives rise to a system of cooperation in furtherance of the notion that justice and the common good are best served by policies that benefit all nations.[81] Seen in this light, it can also be traceable in the context of international environmental law, in relation to the role of the developing world. Thus, the Stockholm Declaration of 1972 proclaimed that nations must undertake a coordinated effort to preserve and safeguard natural resources, insofar as environmental protection "affects the well-being of peoples and economic development throughout the world".[82] Recognizing that "environmental deficiencies generated by the conditions of under-development and natural disaster pose grave problems", the Declaration calls for accelerated development through financial and technological assistance.[83] The Declaration further provides that developing countries shall provide, and developing countries shall assist in promoting, scientific information and expertise relevant to mitigating environmental degradation.[84] The duties placed on developed and developing States alike are premised on the recognition that global environmental problems "will require extensive cooperation among nations"[85] with the specific understanding that "industrialized countries should make efforts to reduce the gap [between] themselves and the developing countries".[86] Moreover, the Rio Declaration on Environment and Development, reaffirming Stockholm, prioritizes the concerns of developing countries, stating that the "special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority".[87]

55. Subsequent instruments implemented this obligation to cooperate, establishing mechanisms to share information, finances and scientific resources. The Vienna Convention for the Protection of the Ozone Layer,[88] for example, mandates cooperative research and information-sharing among all States parties to the Convention. In 1990, the amending Montreal Protocol[89] fulfilled the Vienna

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[79] General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1.

[80] B. Babović, "The duty of States to cooperate with one another in accordance with the Charter", in Milan Šahović, *Principles of International Law Concerning Friendly Relations and Cooperation* (Dobbs Ferry, New York: Oceana Publications, 1972), at p. 289.

[81] See generally R. St. J. Macdonald, "Solidarity in the practice and discourse of public international law" in C. Dominicé, R. Patry and C. Reymond (eds.), *Etudes de Droit International en l'honneur de Pierre Lalive* (1993), at p. 275.

[82] Declaration of the United Nations Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1992* (United Nations publication, Sales No. E.73.II.A.14), and corrigendum, chap. I.

[83] Ibid., principle 9.

[84] Ibid., principle 20.

[85] Ibid., para. 7.

[86] Ibid., para. 4.

[87] Report of the *United Nations Conference on Environment and Development Rio de Janeiro, 3-14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda).

[88] United Nations, *Treaty Series*, vol. 1513, No. 26164.

[89] Montreal Protocol on Substances that Deplete the Ozone Layer, United Nations, *Treaty Series*, vol. 1522, No. A-26369.

Convention's promise to take into account the "circumstances and particular requirements of developing countries". Developing countries are given leniency with respect to certain proscribed or regulated chemicals,[90] and the Protocol mandates that developed nations shall provide financial assistance and technology to less-developed nations.[91] The Protocol establishes a multilateral fund to motivate participation by developing countries.[92] In turn, developing nations are bound to pollution control measures, and the parties to the Convention are empowered to invoke non-compliance procedures where appropriate.[93]

56. As noted above, solidarity is an important element of cooperation towards solving economic problems, as put forward in Article 1(3) of the Charter of the United Nations and in the 1970 Friendly Relations Declaration.[94] The Declaration recognizes a duty of States to cooperate with one another, and provides that "States should cooperate in the promotion of economic growth throughout the world, especially that of the developing countries".[95] This concept was brought to the fore and expanded by the Declaration on the Establishment of a New International Economic Order.[96] The Declaration is based upon a duty of States to cooperate "in the solving of world economic problems [...] bearing in mind the necessity to ensure accelerated development of all the developing countries".[97] And further holds that "cooperation for development is the shared goal and common duty of all countries".[98]

57. Solidarity as an international legal principle found reflection beyond the 1974 Declaration. The Declaration of International Economic Cooperation, adopted by the General Assembly in 1990, notes the interdependence of the international community[99] and recognizes that reviving growth in developing countries requires "a concerted and committed effort by all countries".[100] Most recently, the United Nations Millennium Declaration places solidarity among the fundamental values essential to international relations.[101] The declaration further elaborates on its invocation of solidarity:

> Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most.[102]

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[90] Ibid., art. 5, paras. 1-3.

[91] Ibid., arts. 10 and 10A; see also art. 5, para. 5 (noting that developing nations' compliance with the Protocol's control measures will be contingent on developed countries' willingness to provide financial and technological assistance).

[92] Ibid., art 10.

[93] Ibid., art 5.

[94] General Assembly resolution 2625 (XXV), annex.

[95] Ibid.

[96] General Assembly resolution 3201 (S-VI) of 1 May 1974.

[97] Ibid., para. 4.

[98] Ibid., para. 3.

[99] General Assembly resolution S-18/3 of 1 May 1990, annex, para. 12.

[100] Ibid., para. 21.

[101] See General Assembly resolution 55/2 of 8 September 2000, para. 6.

[102] Ibid.

58. Solidarity is also reflected in regional instruments. The African Charter on Human and Peoples' Rights[103] establishes that individuals and groups should dispose of their wealth "with a view to strengthening African unity and solidarity"[104] and guarantees the right to social and economic development.[105] It also establishes a right to a "satisfactory environment"[106] and the duty of the individual to promote social and national solidarity.[107]

59. The international cooperation imperative is firmly rooted in international instruments of a humanitarian character. As noted above, the duty to cooperate in the context of human rights has been explicitly embodied in Article 1(3) of the Charter of the United Nations. Likewise, it has been reiterated in numerous General Assembly declarations and resolutions. Thus, for example, the Friendly Relations Declaration proclaims:

> States shall cooperate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance.[108]

And in its resolution 56/152, entitled "Respect for the purposes and principles contained in the Charter of the United Nations to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms and in solving international problems of a humanitarian character", the General Assembly affirmed

> the solemn commitment of all States to enhance international cooperation in the field of human rights and in the solution to international problems of a humanitarian character in full compliance with the Charter of the United Nations.

60. As has been pointed out in the preliminary report on this topic, international human rights law takes on special significance in this context.[109] The International Covenant on Economic, Social and Cultural Rights refers explicitly to international cooperation as a means of realizing the rights contained therein.[110] This has been reiterated by the Committee on Economic, Social and Cultural Rights in its General Comments relating to the implementation of specific rights guaranteed by the Covenant.[111] In a recent resolution, the Economic and Social Council encouraged

> Member States and, where applicable, regional organizations to strengthen operational and legal frameworks for international disaster relief, [to take] into account, as appropriate, the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance,

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[103] United Nations, *Treaty Series*, vol. 1520, No. 26363.
[104] Ibid., art. 21, para. 4.
[105] Ibid., art. 22.
[106] Ibid., art. 24.
[107] Ibid., art. 29, para. 4.
[108] See note 79 above.
[109] See A/CN.4/598, paras. 25 and 26.
[110] General Assembly resolution 2200 A (XXI), annex, arts. 11, 15, 22 and 23.
[111] See, in particular, General Comment No. 2 (E/1990/23), No. 3 (E/1991/23), No. 7 (E/1998/22), No. 14 (E/C.12/2000/4) and No. 15 (E/C.12/2002/11).

adopted at the thirtieth International Conference of the Red Cross and Red Crescent held in Geneva in November 2007.[112]

And, in the same resolution, the Council

Recognizes the benefits of engagement of and coordination with relevant humanitarian actors to the effectiveness of humanitarian response, and encourages the United Nations to continue to pursue efforts to strengthen partnerships at the global level with the International Red Cross and Red Crescent Movement, relevant humanitarian non-governmental organizations and other participants of the Inter-Agency Standing Committee.[113]

61. International cooperation gained particular prominence in the 2006 Convention on the Rights of Persons with Disabilities which is, inter alia, applicable "in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters".[114] In a separate article of that Convention international cooperation is dealt with in the following terms:

States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities.[115]

62. There is a vast number of instruments of specific relevance to the protection of persons in the event of disasters which demonstrate the importance of the imperative of international cooperation in combating the effects of disasters. Not only are these instruments in themselves expressions of cooperation, they generally reflect the principle of cooperation relating to specific aspects of disaster governance in the text of the instrument. Typically in bilateral agreements, this has been reflected in the title given to the instrument, denoting either cooperation or (mutual) assistance.[116] Moreover, the cooperation imperative, usually laid down in the preamble of a particular instrument, in the vast majority of cases is framed as one of the objectives of the instrument or is attributed positive effects towards their attainment. Again, the Tampere Convention is of relevance in this respect as it indicates in paragraph 21 of its preamble that the parties wish "to facilitate international cooperation to mitigate the impact of disaster".[117] Another example, very much in line with the scope of the present topic, can be found in an agreement between France and Malaysia:

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[112] Resolution 2008/36 of 25 July 2008, para. 5

[113] Ibid., para. 7

[114] General Assembly resolution 61/106 of 13 December 2006, art. 11.

[115] Ibid., art. 32.

[116] See A/CN.4/590/Add.2 for a comprehensive list of relevant instruments. For a further typology of instruments for the purposes of international disaster response law, see H. Fischer, "International disaster response law treaties: trends, patterns, and lacunae" in IFRC, *International disaster response laws, principles and practice: reflections, prospects and challenges* (2003), at pp. 24-44 ("Despite the fact that in all cases the specific purpose is different, the underlying rationale is the need to increase capacities to deal with the effects of disaster", p. 33)

[117] See note 57 above.

> Convinced of the need to develop cooperation between the competent organs of both Parties in the field of the prevention of grave risks and the protection of populations, property and the environment ...[118]

63. Cooperation should, however, not be interpreted as diminishing the prerogatives of a sovereign State within the limits of international law. On the contrary, the principle underlines respect for the sovereignty of States and its corollary, non-intervention and the primary role of State authorities in the initiation, organization, coordination and implementation of the measures relevant to the protection of persons in the event of disasters. Sovereignty may be conceived as "a concept to describe a pre-existing reality, a scheme of interpretation, used to organize and structure our understanding of political life".[119] Non-intervention is a well-established principle of international law, dating from the early stages of that body of law,[120] whose substantive contents need not be restated here. Suffice it to point out that the protection of persons in the event of disasters will often involve the adoption of political, regulatory, administrative and juridical measures by the affected State, including the deployment of its armed forces within its own territory, which are expressions of the "right of every sovereign State to conduct its affairs without outside interference", as the International Court of Justice defined said principle in its 1986 Judgment in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*.[121]

64. It is the primary duty of the authorities of the affected State to take care of the victims of natural disasters and similar emergencies occurring in its territory.[122] In the words of the General Assembly, "the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity"[123]

65. Cooperation complements the primary duty of States. However, this primary duty concerns not only Governments and governmental authorities, but also competent international organizations and elements of civil society, such as national Red Cross and Red Crescent societies. The position has been characterized with clarity by the Secretary-General as early as 1971 in the comprehensive report entitled "Assistance in Cases of Natural Disaster":

> While a Government should be able to count on the help of the international community, provided through Governments, the League of Red Cross Societies

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[118] Agreement between the Government of the French Republic and the Government of Malaysia on Cooperation in the Field of Disaster Prevention and Management and Civil Security, 25 May 1998, preambular paragraph 4: "Convaincus de la nécessité de developer une cooperation entre les organisms compétents de deux Parties dans la domaine de la prévention des risques majeurs et de la protection des populations, des biens et de l'environnement" (English translation by the Special Rapporteur).

[119] W. G. Werner, "State Sovereignty and International Legal Discourse", in: Ige F. Dekker and Wouter G. Werner (eds.), *Governance and International Legal Theory*, Martinus Nijhoff Publishers (2004), at 155.

[120] For an early exposition of its origins, see M. Bernard, *On the Principle of Non-Intervention. A Lecture Delivered in the Hall of All Souls' College* (1860).

[121] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1986*, para. 202.

[122] Resolution 46/182 of 19 December 1991, annex, para. 4. See also Hyogo Declaration 2005, note 77 above, para. 4.

[123] Resolution 45/100 of 14 December 1990, sixth preambular paragraph.

> and other voluntary agencies or the United Nations organizations, in its preparations against or its efforts to meet such emergencies, the primary responsibility for protecting the life, health and property of people within its frontiers and for maintaining the essential public services rests with that Government. International assistance can only supplement, and will depend very largely for its effectiveness on, the efforts of the country itself through its Government or through such organizations as its national Red Cross society.[124]

66. The 2008 Secretariat memorandum points out the link between the principle of cooperation as a sine qua non for this topic and the multiple actors involved, listing not only State actors but also non-State actors, that is, relief organizations.[125] The involvement of and cooperation with non-State actors has thus gradually found its way into the international legal discourse which recognizes that the increasing interdependence within international society necessitates international cooperation including actors other than States. In the words of the Independent expert on human rights and international solidarity:

> From a global perspective, interdependence, by its very nature, exists not only between States, but also between other international actors, and these relationships require international cooperation.[126]

67. The role of those actors has been recognized as essential for combating the effects of disasters. The duty of States to cooperate with the United Nations is expressed in Article 56 of the Charter and the Organization has, in turn, emphasized the need to work in close cooperation with IFRC[127] and with non-governmental organizations and civil society as a whole.[128]

68. In addition, a number of treaties between States and international organizations[129] have been concluded that acknowledge the importance of international cooperation between State actors and non-State actors at the international level.[130] Other international instruments do likewise. The preamble to the 1992 Rio Declaration cites the goal of "establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people".[131] The concept of global partnership is then

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[124] E/4994, para. 100. This point was reaffirmed by the General Assembly in resolution 43/131 of 8 December 1988.

[125] A/CN.4/590, para. 18.

[126] A/HRC/4/8, para. 11.

[127] See, inter alia, resolutions 2435 (XXIII) of 19 December 1968, 2816 (XXVI) of 14 December 1971, 36/225 of 17 December 1981, 46/182 of 19 December 1990, 57/150 of 16 December 2002 and 63/139 of 11 December 2008.

[128] Resolutions 63/139 of 11 December 2008 and 63/141 of 11 December 2008.

[129] The Special Rapporteur follows the definition provisionally adopted by the Commission under the topic of "Responsibility of international organizations". Draft article 2 defines an international organization for the purposes of the draft articles as "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities", *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 164.

[130] See the list of instruments between States and international organizations in A/CN.4/590/Add.2, annex II, sect. III.

[131] See note 87 above.

repeated in principles 7, 21 and 27. Cooperation is expressed in a number of ways. With regard to the present topic, principle 18 provides:

> States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.

The ASEAN Agreement on Disaster Management and Emergency Response of 2005 states that:

> [t]he Parties, in addressing disaster risks, shall involve, as appropriate, all stakeholders including local communities, non-governmental organizations and private enterprises, utilizing, among others, community-based disaster preparedness and early response approaches.[132]

The 1986 Convention on Assistance in the Case of Nuclear Accident or Radiological Emergency provides in its first article:

> The States Parties shall cooperate between themselves and with the International Atomic Energy Agency.

The Hyogo Declaration expresses the value of non-State actor involvement in the context of disaster reduction in terms of "cooperation, including partnerships".[133] Likewise, the Institute of International Law, in its resolution on humanitarian assistance, has recognized the "essential role played by the United Nations, intergovernmental organizations, the International Committee of the Red Cross and non-governmental organizations".[134]

69. The concept of civil society does not necessarily carry a transnational connotation. Rather, it emphasizes local civil society. The working definition proposed by the London School of Economics Centre for Civil Society is illustrative:

> Civil society refers to the arena of uncoerced collective action around shared interests, purposes and values. In theory, its institutional forms are distinct from those of the state, family and market, though in practice, the boundaries between state, civil society, family and market are often complex, blurred and negotiated. Civil society commonly embraces a diversity of spaces, actors and institutional forms, varying in their degree of formality, autonomy and power. Civil societies are often populated by organizations such as registered charities, development non-governmental organizations, community groups, women's organizations, faith-based organizations, professional associations, trade unions, self-help groups, social movements, business associations, coalitions and advocacy groups.[135]

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[132] ASEAN Document Series 2005, p. 157, article 3(6).

[133] Hyogo Declaration 2005, note 77 above, para. 4. See also para. 2 in which "the importance of involving all stakeholders" is underlined.

[134] Resolution adopted on 2 September 2003 at the session held in Bruges, Belgium.

[135] "What is Civil Society?", Centre for Civil Society, London School of Economics, 2004, available at http://www.lse.ac.uk/collections/CCS/what_is_civil_society.htm.

70. In the light of the foregoing, the Special Rapporteur proposes the following draft article on the duty of cooperation:

Draft article 3
Duty to cooperate

For the purposes of the present draft articles, States shall cooperate among themselves and, as appropriate, with:

(a) competent international organizations, in particular the United Nations;

(b) the International Federation of Red Cross and Red Crescent Societies; and

(c) civil society.

IV. Future work

71. The present report has focused on the scope of the protection of persons in the event of disasters and proposed a definition of disaster. It has stressed the conceptual approach to guide further developments, and has put forward a draft article on the basic principle that inspires work on the topic. As the next step, work shall be directed towards complementing the first axis, namely, that of the rights and obligations of States in relation to one another, and identifying the principles that inspire the protection of persons in the event of disaster, in its aspect related to persons in need of protection. Further work will concentrate on the operational aspects of disaster relief and assistance.

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Reservations to treaties in the context of succession of States

Memorandum by the Secretariat

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I. Introduction

1. The Vienna Convention on the Law of Treaties, of 23 May 1969,[1] does not address the question of succession of States in respect of treaties. In fact, article 73 of that Convention contains a safeguard clause stipulating that "the provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States [...]". A similar safeguard clause appears in article 74, paragraph 1, of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, of 21 March 1986.[2]

2. The Vienna Convention on Succession of States in respect of Treaties, of 23 August 1978,[3] lays down, in article 20, rules concerning reservations in the context of succession of States. However, this provision applies only to the case of a "newly independent State", meaning, according to the definition set out in article 2, paragraph 1 (f), of the Convention, " ... a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible". Thus, the rules governing reservations, as set out in the Vienna Convention of 1978, cover only cases of succession in which a State gains independence as a result of a decolonization process; this also includes new States whose territories had previously been under the mandate and/or trusteeship system. It should be noted, moreover, that the Vienna Convention of 1978 contains no provisions on objections to reservations.

3. The present study is divided into two parts.

4. The first part provides an overview of the rules laid down in article 20 of the Vienna Convention of 1978, taking account of the debates held at the 1977-1978 Vienna Conference and of the work done prior to the Conference by the International Law Commission. Some questions that are left unresolved by the Vienna Convention of 1978 are also discussed.

5. The second part of the study reviews the practice in relation to reservations and objections to reservations in the context of succession of States. The practice in relation to treaties for which the Secretary-General of the United Nations serves as depositary is considered first. Some elements of the practice in relation to other treaties are then mentioned. This review also takes into account the replies to the two questionnaires which the Special Rapporteur addressed to States and to international organizations, respectively, in 1999.[4] It should be stated at the outset, however, that the vast majority of States or international organizations (34 in all) that replied to the questionnaires did not provide any information on their practice in this regard.

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[1] United Nations, *Treaty Series*, vol. 1155, No. 18232.

[2] This Convention is not yet in force; see *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February-21 March 1986*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.94.V.5), document A/CONF.129/15.

[3] United Nations, *Treaty Series*, vol. 1946, p. 3.

[4] Questionnaires prepared by the Special Rapporteur on reservations to treaties pursuant to paragraph 493 of the report of the International Law Commission on the work of its forty-seventh session.

II. The rules of the Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978)[5]

A. The case of newly independent States

6. In contrast to cases involving the uniting or separation of States, which are governed by the provisions of part IV of the Vienna Convention of 1978, the basic rule laid down in part III of the Convention with regard to newly independent States is that of "non-succession", i.e. the absence of automatic devolution to the newly independent State of treaties by which the predecessor State was bound. Nonetheless, the newly independent State may voluntarily notify its succession to any such treaty.

7. It is on this premise that article 20 of the Vienna Convention of 1978 sets out rules on reservations to treaties in the context of succession to a treaty by a newly independent State. Except for a few minor differences in the wording, this provision mirrors draft article 19 adopted by the International Law Commission at its twenty-sixth session.[6]

1. Status of reservations formulated by the predecessor State

(a) Presumption in favour of the maintenance of reservations

8. Article 20, paragraph 1, of the Vienna Convention of 1978 establishes, in the case of silence on the part of a newly independent State in its notification of succession, a presumption that it is maintaining any reservation formulated by the predecessor State which was applicable at the date of the succession of States in respect of the territory to which the succession relates.[7] This presumption is reversed, however, if the successor State expresses a "contrary intention" when making the notification of succession or if, at the same time, it formulates a reservation "which relates to the same subject matter".

9. The presumption in favour of the maintenance of reservations formulated by the predecessor State had already been proposed by Professor D.P. O'Connell, Rapporteur of the International Law Association on the subject of "the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors".[8] It had also been proposed at the outset by the International Law Commission's first Special Rapporteur on the succession of States in respect of treaties, Sir Humphrey Waldock, who based his considerations, in particular, on a concern for respecting

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[5] See note 3 above.

[6] The text of the draft articles, with commentary, is reproduced in *Yearbook of the International Law Commission*, 1974, vol. II (Part One), pp. 174 ff., para. 85.

[7] This paragraph provides as follows: "When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession under article 17 or 18, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation."

[8] See *Yearbook of the International Law Commission*, 1969, vol. II, p. 49, para. 17, "additional point" No. 10: "A successor State can continue only the legal situation brought about as a result of its predecessor's signature or ratification. Since a reservation delimits that legal situation it follows that the treaty is succeeded to (if at all) with the reservation."

the actual intention of the successor State by avoiding the creation of an irreversible situation[9] and on a number of elements of practice that seemed to support such a presumption.[10] The second Special Rapporteur on the subject, Sir Francis Vallat, also supported the presumption in favour of the maintenance of reservations formulated by the predecessor State, despite the contrary view of a number of Governments, which had recommended the reversal of this presumption.[11]

10. A majority of the members of the International Law Commission shared the view of the two Special Rapporteurs, and the commentary to article 19 as finally adopted by the Commission contains the following arguments supporting the presumption in favour of the maintenance of reservations formulated by the predecessor State:

> "First, the presumption of an intention to maintain the reservations was indicated by the very concept of succession to the predecessor's treaties. Secondly, a State is in general not to be understood as having undertaken more onerous obligations unless it has unmistakably indicated an intention to do so; and to treat a newly independent State, on the basis of its mere silence, as having dropped its predecessor's reservations would be to impose upon it a more onerous obligation. Thirdly, if presumption in favour of maintaining reservations were not to be made, the actual intention of the newly independent State might be irrevocably defeated; whereas, if it were made and the presumption did not correspond to the newly independent State's intention, the latter could always redress the matter by withdrawing the reservations."[12]

11. At the Vienna Conference of 1977-1978, the representative of the United Republic of Tanzania had proposed an amendment to reverse the presumption in favour of the maintenance of reservations formulated by the predecessor State. The

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[9] The Special Rapporteur indicated, in this regard, that "[...] if a presumption in favour of maintaining reservations were not to be made, the actual intention of the successor State might be irrevocably defeated; whereas, if it were made and the presumption did not correspond to the successor State's intention, the latter could always redress the matter by withdrawing the reservations" (Third report on succession in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur, document A/CN.4/224 and Add.1 (hereinafter "Waldock, third report"), in *Yearbook of the International Law Commission*, 1970, vol. II, p. 50.
This reasoning has been criticized in the literature. See, in particular, Pierre-Henri Imbert, *Les réserves aux traités multilatéraux. Evolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de Justice le 28 mai 1951*, Paris, Pedone, 1979, p. 309; the author considers that "[...] there is no reason to think that the State would not study the text of the convention carefully enough to know exactly which reservations it wished to maintain, abandon or formulate".

[10] Waldock, third report, in *Yearbook of the International Law Commission*, 1970, vol. II, pp. 47-49.

[11] First report on succession of States in respect of treaties, by Sir Francis Vallat, Special Rapporteur, document A/CN.4/278 and Add.1-6 (hereinafter "Vallat, first report"), in *Yearbook of the International Law Commission*, 1974, vol. II (Part One), pp. 52-54.

[12] *Yearbook of the International Law Commission*, 1974, vol. II (Part One), p. 226, para. (17). One author has nonetheless questioned the soundness of these explanations, casting doubt in particular on the assumption that the predecessor State's reservations would be "necessarily advantageous to the newly independent State"; P.-H. Imbert, op. cit., 1979, p. 310. The author also suggests that "[...] since reservations constitute derogations from or limitations on a State's commitments, they should not be a matter of presumption. On the contrary, it makes more sense to assume that, in the absence of a formal statement of its intention, a State is bound by the treaty as a whole".

wording of that amendment provided that the successor State was considered as discontinuing any reservations formulated by the predecessor State unless it expressed a contrary intention.[13] The representative of the United Republic of Tanzania expressed a preference for a "clean slate" in regard to reservations and pointed out that reservations formulated by the predecessor State were not necessarily in the interest of the successor State.[14] The amendment was rejected, however, by 26 votes to 14, with 41 abstentions,[15] and the presumption in favour of the maintenance of reservations was retained in the final text of article 20 as adopted at the Vienna Conference.[16]

12. This presumption is inferred logically, since succession to a treaty by a newly independent State, though voluntary, is a true succession that must be distinguished from accession. Because it is a succession, it seems reasonable to presume that treaty obligations are transmitted to the successor State as modified by the reservation formulated by the predecessor State.

(b) Formulation of a "reservation which relates to the same subject matter"

13. The presumption in favour of the maintenance of reservations formulated by the predecessor State is reversed, under article 20, paragraph 1, of the Vienna Convention of 1978 not only if a "contrary intention" is specifically expressed by

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[13] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties. Vienna, 4 April-6 May 1977 and 31 July-23 August 1978*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* [1977 session], A/CONF.80/16, United Nations publication, Sales No. 78.V.8 (hereinafter A/CONF.80/16), 28th meeting, para. 37; and A/CONF.80/14, para. 118 (c) (reproduced in *Documents of the Conference*, A/CONF.80/16/Add.2). A preference for the opposite presumption had also been expressed by other delegations; see A/CONF.80/16, 28th meeting, para. 13 (Romania), para. 18 (India) and para. 33 (Kenya).

[14] A/CONF.80/16, 27th meeting, para. 79.

[15] A/CONF.80/16, 28th meeting, para. 41.

[16] While the presumption in favour of the maintenance of the predecessor State's reservations has been criticized in the literature (see, in particular, P.-H. Imbert, op. cit., 1979, pp. 307-318), a number of authors have supported this presumption; see D. P. O'Connell, *State Succession in Municipal Law and International Law*, Cambridge Studies in International and Comparative Law, VII (Volume II: International Relations), Cambridge, Cambridge University Press, 1967, p. 229, which states: "Since a State which makes a reservation to a multilateral convention commits itself only to the convention as so reserved, its successor State cannot, logically, succeed to the convention without reservations. Should the reservation be unacceptable to it the appropriate procedure would be to ask the depositary to remove it and notify all parties accordingly. It might be objected that to this extent the new State is becoming a party to new commitments without acceding, but in practice this is not likely to prove a difficulty, except in respect of close conventions" (note omitted). See also Giorgio Gaja, "Reservations to treaties and the newly independent States", *Italian Yearbook of International Law*, 1975, pp. 54-56 (the author states, in particular: "The opinion that the predecessor State's reservations are maintained is also based on the reasonable assumption that when a newly independent State elects to become a party to a treaty by means of a notification of succession, in principle it wants the treaty to continue to be applied to its territory in the same way as it did before independence" (p. 55)); J. M. Ruda, "Reservations to treaties", *Recueil des cours: Collected Courses of The Hague Academy of International Law*, vol. 146, 1975-III, p. 206 ("[...] the solution given by the ILC seems to be more acceptable, in the absence of any clear existing customary rule or practice, because it affords better protection for the interests of the successor State"); also, P. K. Menon, "The newly independent States and succession in respect of treaties", in *Korean Journal of Comparative Law*, vol. 18, 1990, p. 152.

the successor State when making the notification of succession, but also if that State formulates a reservation "which relates to the same subject matter" as the reservation formulated by the predecessor State. The exact wording of this second possibility was a subject of debate in the International Law Commission.

14. Sir Humphrey Waldock had proposed, in his third report, a different formulation that provided for the reversal of the presumption that the predecessor State's reservations were maintained if the successor State formulated "reservations different from those applicable ... at the date of succession".[17]

15. In its draft article 15 provisionally adopted in 1972, the Commission had settled on a solution according to which the presumption that the predecessor State's reservations were maintained was reversed if the successor State formulated a new reservation "which relates to the same subject matter and is incompatible with [the reservation formulated by the predecessor State]".[18] However, in response to comments from some Governments, the Commission decided to delete, in its final draft article, the reference to the test of "incompatibility", which "might be difficult to apply"; the commentary to draft article 19 merely pointed out that "[...] if the newly independent State were to formulate a reservation relating to the same subject-matter as that of the reservation made by the predecessor State, it could reasonably be presumed to intend to withdraw that reservation".[19]

16. The wording that was finally adopted by the International Law Commission and reflected in the Vienna Convention of 1978 has been criticized in the literature for omitting the test of "incompatibility" between a reservation formulated by the predecessor State and one formulated by the successor State.[20]

2. New reservations formulated by a successor State that is a newly independent State

17. Article 20, paragraph 2, of the Vienna Convention of 1978 establishes that a successor State that is a newly independent State may formulate, when making a notification of succession, reservations that are not excluded by the provisions of subparagraph (a), (b) or (c) of article 19 of the 1969 Vienna Convention on the Law of Treaties.[21] Article 20, paragraph 3, of the Vienna Convention of 1978 provides, further, that the rules set out in articles 20 to 23 of the 1969 Vienna Convention on the Law of Treaties apply in respect of reservations formulated by a newly independent State in its notification of succession.[22]

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[17] Waldock, third report, in *Yearbook of the International Law Commission*, 1970, vol. II, p. 47.

[18] *Yearbook of the International Law Commission*, 1972, vol. II, p. 260.

[19] *Yearbook of the International Law Commission*, 1974, vol. II (Part One), p. 226, para. (18). The removal of the reference to the test of "incompatibility" had been supported by the second Special Rapporteur; cf. Vallat, first report, in *Yearbook of the International Law Commission*, 1974, vol. II (Part One), pp. 53-54.

[20] See G. Gaja, loc. cit., 1975, pp. 59-60.

[21] Article 20, paragraph 2, of the Vienna Convention of 1978 provides as follows: "When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty under article 17 or 18, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraph (a), (b) or (c) of article 19 of the Vienna Convention on the Law of Treaties."

[22] Article 20, paragraph 3, of the Vienna Convention of 1978 provides as follows: "When a newly independent State formulates a reservation in conformity with paragraph 2, the rules set out in articles 20 to 23 of the Vienna Convention on the Law of Treaties apply in respect of that reservation."

18. As the International Law Commission had noted in its commentary to draft article 19,[23] the existence of this capacity seems to have been confirmed in practice, including the practice regarding cases of succession to multilateral treaties for which the Secretary-General of the United Nations serves as depositary.[24] In his third report, the first Special Rapporteur, Sir Humphrey Waldock, based his views inter alia on the practice of the Secretary-General of the United Nations, who, on several occasions, seemed to have acknowledged that newly independent States have this capacity, without prompting any objections from States to this assumption.[25] The second Special Rapporteur was also in favour, for "practical" reasons, of acknowledging the right of a newly independent State to make new reservations when notifying its succession.[26]

19. The view of the two Special Rapporteurs prevailed in the Commission, which, as indicated in the commentary to draft article 19 as finally adopted, had a choice between two alternatives: "(*a*) to decline to regard any notification of succession made subject to new reservations as a true instrument of succession and to treat it in law as a case of accession, or (*b*) to accept it as having the character of a succession but at the same time apply to it the law governing reservations as if it were a wholly new expression of consent to be bound by the treaty".[27] Drawing upon the practice of the Secretary-General and wishing to take a "flexible" approach in this regard, the Commission opted for the second alternative, noting also that it might ease the access of a newly independent State to a treaty that was not, "[...] for technical reasons, open to its participation by any other procedure than succession".[28]

20. At the Vienna Conference of 1977-1978, the Austrian delegation had proposed the deletion of paragraphs 2 and 3 of the provision that would become article 20 of the 1978 Convention.[29] That delegation considered that recognizing the capacity of a newly independent State to formulate new reservations when notifying its succession "seemed to be based on an erroneous concept of succession".[30] In the Austrian delegation's view, "[i]f a newly independent State wished to make reservations, it should use the ratification or accession procedure provided for becoming a party to a multilateral treaty".[31] However, the Austrian amendment was rejected by 39 votes to 4, with 36 abstentions.[32]

21. The delegations which, at the Vienna Conference, had opposed the Austrian amendment had put forth various arguments, including the desirability of ensuring that the newly independent State would "not be obliged to conform with more complicated ratification procedures than those provided for by the International Law

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[23] *Yearbook of the International Law Commission*, 1974, vol. II (Part One), pp. 224-225, paras. (7) to (12).

[24] See chap. II, sect. A below.

[25] Waldock, third report, *Yearbook of the International Law Commission*, 1970, vol. II, pp. 48-50.

[26] Vallat, first report, in *Yearbook of the International Law Commission*, 1974, vol. II (Part One), p. 54, paras. 291-294.

[27] Commentary to draft article 19, *Yearbook of the International Law Commission*, 1974, vol. II (Part One), p. 227, para. (20).

[28] Ibid.

[29] A/CONF.80/16, 27th meeting, paras. 59-64.

[30] A/CONF.80/16, 27th meeting, para. 60.

[31] Ibid. See also A/CONF.80/16, 28th meeting, para. 30.

[32] A/CONF.80/16, 28th meeting, para. 40.

Commission",[33] the alleged incompatibility of the Austrian amendment with the principle of self-determination[34] or the principle of the "clean slate",[35] the need to be "realistic" rather than "puristic",[36] and the fact that a succession of States was not "a legal inheritance or a transmission of rights and obligations".[37]

22. While it has been criticized in the literature,[38] a newly independent State's capacity to formulate reservations when notifying its succession to a treaty is expressly acknowledged by some authors.[39] The recognition of this capacity may be considered a "pragmatic" solution that takes account of the "non-automatic", i.e. voluntary, nature of succession to treaties on the part of newly independent States.

23. However, a newly independent State's capacity to formulate reservations to a treaty to which it intends to succeed ought not to be unlimited over time. It seems reasonable to consider that a newly independent State should exercise this capacity when notifying its succession and that reservations formulated after that date should be subject to the legal regime for late reservations, as set out in draft guidelines 2.3.1, 2.3.2, 2.3.3 and 2.3.5 provisionally adopted so far by the Commission.[40]

3. Questions not covered by the Convention

(a) Other types of declarations

24. Article 20 of the 1978 Convention exclusively governs the issue of reservations.

25. At the Vienna Conference, the delegation of the Federal Republic of Germany had proposed an amendment broadening the scope of this provision. The amendment

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[33] A/CONF.80/16, 27th meeting, para. 71 (Netherlands).

[34] Ibid., para. 73 in fine (Algeria) and para. 89 (Guyana).

[35] Ibid., para. 85 (Madagascar).

[36] Ibid., para. 77 (Poland).

[37] A/CONF.80/16, 28th meeting, para. 7 (Israel). The representative of Israel went on to say that: "[A] newly independent State [...] would simply have the right of option to establish itself as a separate party to the treaty in virtue of the legal nexus established by its predecessor. Its right was to notify its own consent to be considered as a separate party to the treaty; that was not a right to step into the predecessor's shoes. The significance of article 19 was that a newly independent State should be 'considered' as maintaining its succession to the treaty. In other words, notification of succession was an independent act of the successor State's own volition."

[38] See Karl Zemanek, "State succession after decolonization", *Recueil des cours: Collected Courses of The Hague Academy of International Law*, vol. 116, 1965-III, pp. 234-235; Andre Gonçalves Pereira, *La succession d'Etats en matière de traités*, Paris, Pedone, 1969, pp. 175-176, note 50; and Hanna Bokor-Szegö, *New States and International Law*, Budapest, Akadémiai Kiadó, 1970, p. 100, cited by G. Gaja, loc. cit., 1975, p. 61, note 39.

[39] See Marco G. Marcoff, *Accession à l'indépendance et succession d'Etats aux traités internationaux*, Fribourg, Editions universitaires, 1969, p. 346. According to the author, "[t]he right to make reservations is not a right that is transmissible through inheritance, but a prerogative that is part of the set of supreme powers attributed by virtue of the protective principle to sovereign States [...]"; the author further considers that "[t]he institution of State succession is not incompatible with the exercise of the right to make reservations insofar as it is recognized under general international law". See also G. Gaja, loc. cit., 1975, pp. 60-65, and J. M. Ruda, loc. cit., 1975, p. 206.

[40] See the report of the International Law Commission on the work of its sixtieth session, 5 May-6 June and 7 July-8 August 2008, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 123, pp. 160-161.

would have prefaced the rules on reservations, as proposed by the International Law Commission, with the indication that "[...] any statement or instrument made in respect to the treaty in connexion with its conclusion or signature by the predecessor State, shall remain effective for the newly independent State".[41] The delegation of the Federal Republic of Germany subsequently withdrew this proposed amendment, to which a number of delegations had objected for various reasons.[42]

(b) Objections to reservations

26. The Vienna Convention of 1978 does not cover the issue of objections to reservations in the context of succession of States.[43] Despite a request to that effect from the representative of the Netherlands[44] and despite the concerns expressed,[45] the Conference provided no solution to this question.

(i) Status of objections formulated by the predecessor State

27. More specifically with respect to the status of objections formulated by the predecessor State, the fact that the Vienna Convention of 1978 is silent on this point seems to leave a gap, as the Vienna Convention on the Law of Treaties of 1969 does not deal with this issue either.[46]

28. Draft article 19, as adopted by the International Law Commission, also did not address the question of objections to reservations in the context of succession of States. In this regard, the Commission noted, in the commentary to this draft article,

> "[...] that it would be better, in accordance with its fundamental method of approach to the draft articles, to leave these matters to be regulated by the ordinary rules applicable to acceptances and objections on the assumption that,

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[41] A/CONF.80/16, 28th meeting; and A/CONF.80/14, para. 118 (b) (reproduced in *Documents of the Conference*, A/CONF.80/16/Add.2).

[42] A/CONF.80/16, 27th meeting, para. 73 (Algeria, which considered that the proposed amendment seemed to bring the principle of self-determination into question); para. 78 (Poland, which believed that the amendment was not sufficiently clear); para. 87 (Madagascar, which felt that the wording of the amendment was "much too broad in scope"); para. 90 (Guyana); and para. 95 (Italy, which found the wording of the amendment "very strong and inflexible").

[43] At the Vienna Conference, Mr. Y. Yasseen, Chairman of the Drafting Committee, explicitly raised this point; see A/CONF.80/16, 35th meeting, para. 17 : "The Drafting Committee had paid particular attention to the question of objections to reservations and objections to such objections, which had been raised by the Netherlands representative. It had noted that, as was clear from the International Law Commission's commentary to article 19, particularly paragraph (15) (A/CONF.80/4, p. 66), the article did not deal with that matter, which was left to be regulated by general international law" (notes omitted). The Chairman of the Drafting Committee also stated that: "[...] it was clear from the wording of article 19 and the International Law Commission's commentary thereto that the question of objections to reservations should be resolved by reference to general international law. What precise solution general international law would provide, it was not within the Committee [of the Whole]'s competence to determine"; A/CONF.80/16, 35th meeting, para. 21.

[44] A/CONF.80/16, 27th meeting, para. 70; 28th meeting, para. 32; and 35th meeting, para. 19.

[45] See A/CONF.80/16, 27th meeting, para. 85 (Madagascar).

[46] See, in this connection, P.-H. Imbert, op. cit., 1979, p. 320. But the author goes on to say, on the following page, that "[d]espite the absence of an express provision, it is on the presumption in favour of the maintenance of objections that article 20 [of the Vienna Convention of 1978] is based" (note omitted). This author believes, however, that this presumption is erroneous, particularly in view of the alleged "*intuitu personae*" nature of objections.

unless it was necessary to make some particular provision in the context of the succession of States, the newly independent State would 'step into the shoes of the predecessor State'."[47]

29. The final words of the above-cited paragraph could imply that the International Law Commission considered that the transmission of objections should be the rule.[48]

30. In order to justify its silence on the question of objections to reservations, the Commission invoked an argument based on the legal effects of such objections. In its commentary, the Commission noted, on the one hand, that unless the objecting State has definitely indicated that by its objection it means to stop the entry into force of the treaty as between the reserving State and the objecting State, the legal position created by an objection to a reservation is "much the same as if no objection had been lodged"; and, on the other, that if such an indication is given, the treaty will not have been in force at all between the predecessor State and the reserving State at the date of the succession.[49]

31. It should be pointed out that the first Special Rapporteur on the succession of States in respect of treaties, Sir Humphrey Waldock, while highlighting the scarcity of practice in this regard, had suggested that the rules regarding reservations should apply *mutatis mutandis* to objections.[50] In particular, this meant that the same presumption that the International Law Commission would later incorporate into its draft article 19, paragraph 1, which was reproduced in article 20, paragraph 1, of the Vienna Convention of 1978, would apply to objections.[51] The second Special Rapporteur, Sir Francis Vallat, also supported the presumption in favour of the maintenance of objections formulated by the predecessor State, while considering that there was "no need to complicate the draft by making express provisions with respect to objections". Sir Francis was of the view, on the one hand, that "[...] on the whole, the reasoning which supports the retention of the presumption in favour of the maintenance of reservations also supports the presumption in favour of the maintenance of objections which is inherent in the present draft"; and, on the other, that it would "[...] always be open to the successor State to withdraw the objection if it wishes to do so".[52]

32. Given the scarcity of practice in this area,[53] it may seem difficult to give a definitive answer to the question of whether or not objections formulated by a predecessor State are

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[47] *Yearbook of the International Law Commission*, 1974, vol. II (Part One), p. 226, para. (15); see also para. (23) of the commentary (p. 227). This explanation was recalled at the Vienna Conference of 1977-1978 by Sir Francis Vallat, acting as an expert consultant; see A/CONF.80/16, 27th meeting, para. 83.

[48] See, in this connection, P.-H. Imbert, op. cit., 1979, p. 320, note 126.

[49] Commentary to article 19, *Yearbook of the International Law Commission*, 1974, vol. II (Part One), p. 226, para. (14). This reasoning seems to be supported by J. M. Ruda, loc. cit., 1975, pp. 207-208. See, however, the rather critical remarks of Jan Klabbers, "State succession and reservations to treaties", in Jan Klabbers and René Lefeber (eds.), *Essays on the Law of Treaties. A Collection of Essays in Honour of Bert Vierdag*, The Hague, Nijhoff, 1998, pp. 109-110.

[50] The provision proposed by Sir Humphrey read as follows: "The rules laid down in paragraphs 1 and 2 regarding reservations apply also, *mutatis mutandis*, to objections to reservations"; Waldock, third report, in *Yearbook of the International Law Commission*, 1970, vol. II, p. 47.

[51] Ibid., p. 51.

[52] Vallat, first report, in *Yearbook of the International Law Commission*, 1974-II, p. 54, para. 289.

[53] This scarcity of practice was noted more than 30 years ago by Giorgio Gaja (loc. cit., 1975, p. 56); it seems that this observation remains valid today (see chap. II below).

transmissible to a newly independent State.[54] It should be noted, however, that the maintenance of objections formulated by the predecessor State was proposed by Professor D.P. O'Connell, Rapporteur of the International Law Association on the subject of "the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors".[55] In addition, certain elements of recent practice, which will be discussed below, seem to support the maintenance of objections.[56]

(ii) Formulation of objections by a successor State that is a newly independent State

33. If the rules regarding reservations had applied *mutatis mutandis* to objections, as proposed by the first Special Rapporteur, Sir Humphrey Waldock, then a successor State could also have formulated its own objections to reservations "whether formulated before or after the date of succession", in line with the time limits set out in article 20, paragraph 5, of the Vienna Convention on the Law of Treaties of 1969.[57]

34. Sir Humphrey Waldock had, however, intended to provide for an exception with respect to the treaties referred to in article 20, paragraph 2, of the Vienna Convention of 1969.[58] Such an exception was warranted, in the Special Rapporteur's view, by the fact that a reservation to a provision of such a treaty must be accepted by all States parties before the reserving State could participate in the treaty. Accordingly, the Special Rapporteur pointed out that allowing a successor State to object to a reservation already accepted by all the parties to the treaty would have empowered that State to compel the reserving State to withdraw from the treaty.[59]

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[54] See, on this subject, Renata Szafarz, "Vienna Convention on Succession of States in respect of Treaties: a general analysis", *Polish Yearbook of International Law*, vol. X, 1980, p. 96. See also the considerations of G. Gaja, loc. cit., 1975, p. 57, who takes the view that practice does not contradict the presumption in favour of the maintenance of objections formulated by the predecessor State, but also does not suffice to support this presumption.

[55] See *Yearbook of the International Law Commission*, 1969, vol. II, p. 49, para. 17, "additional point" No. 13: "Since a new State takes over the legal situation of its predecessor, it takes over the consequences of its predecessor's objections to an incompatible reservation made to a multilateral convention by another party. Therefore the reservation would not be effective against the new State unless the latter formally waives the objection."

[56] See chap. II below.

[57] Waldock, third report, *Yearbook of the International Law Commission*, 1970, vol. II, p. 52. Article 20, para. 5, of the Vienna Convention on the Law of Treaties of 1969 provides as follows: "for the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later".

[58] This paragraph provides as follows: "When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties."

[59] Waldock, third report, *Yearbook of the International Law Commission*, 1970, vol. II, p. 52.

35. One author has expressly acknowledged the right of a newly independent State to formulate, when notifying its succession to a treaty, its own objections with respect to reservations formulated by other States parties.[60]

(iii) Status of objections to reservations formulated by the predecessor State

36. At the Vienna Conference of 1977-1978, the representative of Japan indicated that he could accept the text of draft article 19, as proposed by the International Law Commission, on the understanding, however, that "[...] a State party which had objected to the original reservation which had been made by the predecessor State did not need to repeat the objection with regard to the successor State".[61] A similar view was expressed by the representative of the Federal Republic of Germany, who considered, with respect to both newly independent States and other successor States, that "[t]he successor State was bound *ipso jure* by the individual treaty relationship created by the predecessor State, including the reservations and other declarations made by that State *and the objections thereto entered by its treaty partners*"[62] (italics added).

37. There is a divergence of views among the few authors who have considered the status of objections to reservations formulated by a predecessor State.[63] Nonetheless, it is hard to see why a State that has objected to a reservation made by a predecessor State should have to repeat the objection when the same reservation is maintained by the successor State.

(iv) New objections to reservations maintained by a successor State that is a newly independent State

38. Another question is whether, when a reservation formulated by a predecessor State is maintained by the successor State, the other States parties are entitled to formulate objections to that reservation which they had not formulated with regard to the predecessor State.

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[60] See G. Gaja, loc. cit., 1975, p. 66: "The admissibility of objections on the part of newly independent States notifying succession to a treaty can be founded on the same reason given when considering the admissibility of reservations in cases in which succession depends on acceptance of the treaty by the newly independent State. This State appears to be in the same position as any acceding State, and may therefore take any action open to an acceding State with regard to other States' reservations."

[61] A/CONF.80/16, 28th meeting, paras. 15 and 16.

[62] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties, Vienna, 4 April-6 May 1977 and 31 July-23 August 1978*, vol. II, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* [resumed session, 1978], A/CONF.80/16/Add.1, United Nations publication, Sales No. 79.V.9 (hereinafter A/CONF.80/16/Add.1), 43rd meeting, para. 11.

[63] The view that such objections are maintained is supported by Giorgio Gaja, who explains his position as follows: "Objections made to the predecessor State's reservations continue to apply in relation to the newly independent State. The objecting State obviously may withdraw its objections. If it so wishes, it may do so with regard to the newly independent State only, while maintaining the objection to a similar reservation concerning the application of the treaty to other territories"; loc. cit., 1975, p. 67. *Contra*: P.-H. Imbert, op. cit., 1979, p. 316.

39. This right is explicitly denied by one author, who considers that there is no reason to allow a State party to revoke its acceptance of a reservation that applied to the territory to which the succession relates.[64]

(v) Objections to reservations formulated by a successor State that is a newly independent State

40. When a newly independent State, in notifying its succession to a treaty, formulates reservations which the predecessor State had not formulated, it seems logical to consider that the other States parties to the treaty have the capacity to object to those reservations under the general rules of the law of treaties.[65]

(c) Effects *ratione temporis* of a declaration whereby a newly independent State announces, when notifying its succession to a treaty, that it is not maintaining a reservation formulated by the predecessor State

41. Article 20 of the Vienna Convention of 1978 does not directly address the effects *ratione temporis* of a declaration whereby a newly independent State announces, when notifying its succession to a treaty, that it is not maintaining a reservation formulated by the predecessor State. Neither practice nor the literature seems to provide a clear answer to this question.

42. It seems reasonable to consider that such a declaration will not become operative in relation to another contracting State until notice of it has been received by that State, in accordance with the solution reflected in article 22, paragraph 3 (a), of the Vienna Convention on the Law of Treaties of 1969 regarding the withdrawal of a reservation.

(d) Effects *ratione temporis* of a reservation formulated by a newly independent State when notifying its succession to a treaty

43. Article 20 of the Vienna Convention of 1978 does not specify the date of entry into force of a reservation formulated by a newly independent State when notifying its succession to a treaty.[66]

44. Draft article 19, as adopted by the International Law Commission, is also silent on this issue. The International Law Commission had decided that it would be better to leave the matter to be regulated by the ordinary rules of international law relating to reservations, on the understanding that a reservation could not have

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[64] G. Gaja, loc. cit., 1975, p. 67: "When a newly independent State maintains a reservation made by its predecessor State, the other States parties to the treaty can make no new objection to the reservation because it becomes applicable to the newly independent State. This would appear to be inconsistent with the acceptance of the reservation applicable to the same territory before independence. Such acceptance cannot be revoked with regard to the predecessor State, and no special reason justifies its becoming revocable in respect of the successor State."

[65] Articles 20 to 23 of the Vienna Convention on the Law of Treaties of 1969. See, in this regard, G. Gaja, loc. cit., 1975, p. 67.

[66] See, on this issue, the interpretation given at the Vienna Conference of 1977-1978 by the Austrian delegation, to the effect that "[...] any new reservation made by the new State would become effective not at the date of the succession, but at a later date in accordance with the treaty provisions"; A/CONF.80/16, 28th meeting, para. 28.

retroactive effect.[67] It should be noted, however, that the second Special Rapporteur, Sir Francis Vallat, had proposed the adoption of a provision governing this question, in response to a request to that effect made by the United States of America.[68] The provision proposed by Sir Francis was worded as follows: "A new reservation established under paragraphs 2 and 3 shall not have any effect before the date of the making of the notification of succession".[69]

45. The Secretary-General of the United Nations has gone so far as to consider that a reservation formulated by a newly independent State when notifying its succession should become effective on the day when it would have done so had it been formulated in an instrument of accession, i.e. after a certain amount of time had elapsed, pursuant to the treaty concerned.[70] However, one author has expressed the view that there is no reason to delay, beyond the date of the notification of succession, the effects of a reservation formulated by a newly independent State.[71]

B. Other cases of succession

46. The Vienna Convention of 1978 contains no provisions on the question of reservations in cases of succession other than those leading to the creation of a newly independent State. The fact that article 20 appears in part III of the Convention shows clearly that this provision relates only to newly independent States.[72] The question therefore arises as to how the Convention's silence on this issue should be interpreted.

47. At the Vienna Conference of 1977-1978, it had been suggested that, with respect to other cases of succession, a provision regulating the issue of reservations should be included.[73] The delegation of the Federal Republic of Germany proposed a new article 36 *bis* that provided in particular for the transposition, to the cases of

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[67] Commentary to article 19, *Yearbook of the International Law Commission*, 1974, vol. II (Part One), p. 227, para. (22). The Commission refers here "to the general position that a reservation can only be effective at the earliest from the date when it is made". For another view in support of non-retroactivity, see also the position expressed by Austria (note 66 above).

[68] In the view of the United States of America, "the Commission should eliminate these complications by making it clear that new reservations take effect when made, that is, at the date of notification of succession"; reproduced in Vallat, first report, in *Yearbook of the International Law Commission*, 1974-II, p. 52.

[69] Ibid., p. 55, para. 298.

[70] Cf. letter dated 10 October 1969 from the Secretary-General to the Government of Zambia, the relevant passage of which is cited in the International Law Commission's commentary to draft article 19; *Yearbook of the International Law Commission*, 1974, vol. II (Part One), pp. 224-225, para. (10).

[71] See G. Gaja, loc. cit., 1975, p. 68 : "The newly independent State's interest may be considered to lie in applying the treaty in the same way from the date of acceptance of the treaty. This clearly cannot have the result that reservations, or withdrawals of reservations, made after notification of succession have a retroactive effect. On the other hand, there is no apparent reason why reservations, or withdrawals of reservations, made at the time of notification of succession should not take effect at the same time as the notification" (notes omitted).

[72] See also, in this regard, the explanations given at the Vienna Conference of 1977-1978 by Sir Francis Vallat, expert consultant, on draft article 19 adopted by the International Law Commission; A/CONF.80/16, 27th meeting, para. 84.

[73] A/CONF.80/16, 28th meeting, para. 17 (India), which pointed out that there was a gap in the Convention and, accordingly, a need to add an article on reservations to the part of the Convention which dealt with the uniting and separation of States.

succession referred to in part IV of the Convention, of the rules on reservations applicable to newly independent States.[74] That delegation considered that "[...] the situation with respect to succession, as distinct from accession, was identical for the States to which Parts III and IV of the draft referred".[75]

48. The delegation of the Federal Republic of Germany nonetheless withdrew its proposed amendment after a number of delegations objected to it.[76] Those delegations considered that giving a successor State the right to formulate new reservations was inconsistent with the principle of *ipso jure* continuity of treaties set out by the Convention for cases involving the uniting or separation of States.[77] On the other hand, regarding the presumption in favour of the maintenance of reservations formulated by the predecessor State, various delegations believed that that presumption was obvious in cases involving the uniting or separation of States, bearing in mind the principle of *ipso jure* continuity of treaties, which had been reflected in the Convention in relation to these kinds of succession.[78]

49. It seems that in the light of the regime established by the Vienna Convention of 1978 for cases involving the uniting or separation of States, there are serious doubts as to whether a successor State other than a newly independent State may formulate reservations.[79] These doubts are confirmed in a passage of the separate

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[74] A/CONF.80/16/Add.1, 43rd meeting, paras. 9-12. The amendment proposed by the Federal Republic of Germany was worded as follows:

"1. When under articles 30, 31, 33 and 35 a treaty continues in force for a successor State or a successor State participates otherwise in a treaty not yet in force for the predecessor State, the successor State shall be considered as maintaining

(*a*) any reservation to that treaty made by the predecessor State in regard to the territory to which the succession of States relates;

(*b*) the consent of the predecessor State expressed, in conformity with the treaty, to be bound by part of the treaty;

(*c*) the choice of the predecessor State made, in conformity with that treaty, between differing provisions in the application of the treaty.

2. Notwithstanding paragraph 1, the successor State may however:

(*a*) withdraw or modify, wholly or partly, the reservation (paragraph 1 subparagraph (*a*)) or formulate a new reservation, subject to the conditions laid down in the treaty and the rules set out in articles 19, 20, 21, 22 and 23 of the Vienna Convention on the Law of Treaties;

(*b*) withdraw or modify the consent to be bound by part of the treaty (paragraph 1 subparagraph (*b*));

(*c*) alter the choice made between differing provisions in the application of the treaty (paragraph 1 subparagraph (*c*))" (A/CONF.80/30, para. 118, reproduced in *Documents of the Conference*, A/CONF.80/16/Add.2).

[75] A/CONF.80/16/Add.1, 43rd meeting, para. 11.

[76] A/CONF.80/30, para. 119 (reproduced in *Documents of the Conference*, A/CONF.80/16/Add.2).

[77] A/CONF.80/16/Add.1, 43rd meeting, para. 14 (Poland), para. 15 (United States of America), para. 18 (Nigeria), para. 19 (Mali), para. 20 (Cyprus), para. 21 (Yugoslavia), para. 22 (Australia) and para. 24 (Swaziland, albeit in more nuanced terms).

[78] A/CONF.80/16/Add.1, 43rd meeting, para. 13 (Poland), para. 16 (France), para. 20 (Cyprus), para. 21 (Yugoslavia) and para. 22 (Australia).

[79] See, however, G. Gaja, loc. cit., 1975, pp. 64-65. While he refers specifically to newly independent States, the author makes observations that he believes can apply to other cases of succession. The author reasons as follows: even if a newly independent State were considered not to be entitled to make a reservation when notifying its succession, one should take the view that such a State may achieve practically the same result by making a partial withdrawal (if such a withdrawal is permitted) to the same extent that may be covered by a reservation. In the author's view, these considerations also apply to cases in which succession is considered not to depend on the acceptance of the treaty by the successor State.

opinion annexed by Judge Tomka to the judgment of the International Court of Justice of 26 February 2007 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.[80] Indeed, if succession is considered to take place *ipso jure* in cases involving the uniting or separation of States, it is difficult to contend that a successor State may avoid or alleviate its obligations by formulating reservations.

50. This being the case, if a successor State formulates a reservation, it would seem appropriate to make that reservation subject to the legal regime for "late reservations", as provided for in the draft guidelines provisionally adopted so far by the International Law Commission. Pursuant to draft guideline 2.3.1,[81] such a reservation may not be formulated unless none of the other Contracting Parties objects. This solution would have the advantage of placing the successor State in the same legal position that the predecessor State would have been in if it had sought to formulate a reservation after expressing its consent to be bound by the treaty.

51. The *ipso jure* nature of succession, as established in the Vienna Convention of 1978 for cases involving the uniting or separation of States, also raises doubts as to whether the successor State may formulate objections to reservations to which the

[80] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007*, separate opinion of Judge Tomka, para. 35:

"*There can be no doubt that this decision to notify of the accession to the Genocide Convention, with a reservation to Article IX and not succession (where no reservation is allowed) was motivated by the considerations relating to the present case.* It was intended to prevent a claim that Serbia and Montenegro had obligations under the Genocide Convention prior to June 2001 (in particular, substantive obligations in the period of 1992-1995, relevant for the claims of Bosnia and Herzegovina). This decision was also intended to avoid the jurisdiction of the Court under Article IX, not only for that period, but also for the future until the reservation was eventually withdrawn. Bosnia and Herzegovina timely objected to the Federal Republic of Yugoslavia's notification of accession to the Genocide Convention with a reservation to Article IX.

"That single notification of accession, in my view, was totally inconsistent with the succession by the Federal Republic of Yugoslavia — notified the very same day to the United Nations Secretary-General as accession to the Genocide Convention — to the Vienna Convention on Succession of States in Respect of Treaties, which in Article 34 provides that the treaties of the predecessor State continue in force in respect of each successor State. By the latter notification of succession, the Federal Republic of Yugoslavia became a contracting State of the Vienna Convention on Succession of States in Respect of Treaties as of April 1992. That Convention entered into force on 6 November 1996. Although not formally applicable to the process of the dissolution of the former Yugoslavia, which occurred in the 1991-1992 period, in light of the fact that the former Yugoslavia consented to be bound by the Vienna Convention already in 1980, and the Federal Republic of Yugoslavia has been a contracting State to that Convention since April 1992, one would not expect, by analogy to Article 18 of the Vienna Convention on the Law of Treaties, a State which, through notification of its accession, expresses its consent to be considered as bound by the Vienna Convention on Succession of States in Respect of Treaties to act in a singular case inconsistently with the rule contained in Article 34 of that Convention, while in a great number of other cases to acting in full conformity with that rule.

"These considerations, taken together, lead me to the conclusion that the Court should not attach any legal effect to the notification of accession by the Federal Republic of Yugoslavia to the Genocide Convention, and should instead consider it bound by that Convention on the basis of the operation of the customary rule of *ipso jure* succession codified in Article 34 as applied to cases of the dissolution of a State" (italics added).

[81] See note 40 above.

predecessor State had not objected. One author has explicitly denied that such a State may do so.[82]

52. Another question that merits consideration is that of the effects *ratione temporis* of a declaration whereby a successor State other than a newly independent State announces that it is not maintaining a reservation formulated by the predecessor State. Since, under the regime established in part IV of the Vienna Convention of 1978 for cases involving the uniting or separation of States, succession to treaties takes place *ipso jure* on the date of the succession of States, such a declaration must necessarily be regarded as a *withdrawal* of the reservation in question and, as such, must be considered subject to the ordinary rules of the law of treaties, as reflected in article 22 of the Vienna Convention on the Law of Treaties of 1969. Pursuant to paragraph 3(a) of that article, "[u]nless the treaty otherwise provides, or it is otherwise agreed[,] the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State".

III. Analysis of practice

A. Practice in relation to treaties deposited with the Secretary-General of the United Nations

53. The issue of the succession of States to treaties arose for the Secretary-General, as depositary, from the Organization's very beginnings, in connection with succession to treaties concluded under the auspices of the League of Nations. Newly independent States announced that they were assuming the rights and obligations created by the relevant treaty and that they considered themselves parties to the treaty.[83] Practice was gradually built up through these notifications of succession. Starting in the 1960s, with the admission of a number of newly independent States to the United Nations (most of which were non-metropolitan territories that had become independent), the practice that had emerged since the 1950s became established. A number of points should be mentioned at the outset:

(a) In all cases, the Secretary-General was guided by practical considerations in the exercise of his depositary functions. Accordingly, he did not include a successor State (whether a newly independent State or a State resulting from a uniting or separation of States) in the list of States parties to a treaty deposited with him unless he had received either a notification concerning a particular treaty (most newly independent States deposited such notifications) or a notification accompanied by a list of treaties to which the State concerned was succeeding (as in the case of the Czech Republic and Slovakia);

(b) In cases where a notification of succession was silent on the subject of reservations and/or objections, the Secretary-General included the successor State

[82] G. Gaja, loc. cit., 1975, p. 67: "When, on the contrary, succession is considered to be automatic, the admissibility of objections on the part of the successor State must be ruled out. [...] If the predecessor State had accepted the reservation, such consent cannot be subsequently revoked either by the same State or by its successor."

[83] This was the case of Pakistan in relation to the Special Protocol concerning Statelessness (The Hague, 12 April 1930); see *Multilateral treaties deposited with the Secretary-General (Status as at 31 December 2005)*, United Nations, ST/LEG/SER.E/24, vol. II, p. 561.

(newly independent or other successor State) in the list of States parties to the treaty without making any mention of the reservations and/or objections formulated by the predecessor State. Exceptions can be found, however, with respect to some successor States of the former Yugoslavia.[84] Moreover, the practice shows that, in the absence of an indication on the part of the successor State concerning reservations formulated by the predecessor State, the Secretary-General does not request clarification on this point, leaving it to States parties to draw the legal conclusions they deem appropriate;

(c) Nonetheless, in his reply to the Special Rapporteur's questionnaire,[85] the Chief of the Treaty Section of the United Nations Office of Legal Affairs indicated that "[t]he Secretary-General has encountered difficulties in cases where, upon succession, the successor State makes no mention of the declarations/reservations made by the predecessor State. In these cases the Secretary-General presumes that the successor State is maintaining such declarations/reservations but is unable to take a definitive position". Similarly, in a memorandum addressed to the Regional Representative of the United Nations High Commissioner for Refugees regarding Jamaica's succession to rights and obligations under the 28 July 1951 Convention relating to the Status of Refugees, the Office of Legal Affairs of the United Nations Secretariat assumed in principle that the reservations previously formulated by the United Kingdom remained applicable to Jamaica;[86]

(d) The Secretary-General always mentions any declarations concerning reservations, declarations, objections, etc. (repeating, confirming or amending them) that accompany a notification of succession.

54. Below are some examples that serve as a fairly representative typology of how the question of reservations and objections to reservations has been treated in the context of succession to treaties deposited with the Secretary-General.

1. Reservations

(a) Successor States that are newly independent States

55. The practice of newly independent States in relation to reservations in the context of succession to treaties deposited with the Secretary-General has varied widely:

(a) In a number of cases, newly independent States have deposited a notification of succession to a particular treaty without making any mention of the question of reservations. In such cases, the Secretary-General has included the newly independent State in the list of States parties to the treaty concerned without

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[84] See para. 60 below.

[85] See note 4 above.

[86] See United Nations, *Juridical Yearbook 1963*, p. 182: "Jamaica would have the right to avail itself of these reservations which were made by the United Kingdom under the terms of the Convention and it may be that in due course your office will wish to obtain a declaration by Jamaica which would withdraw these reservations. However, we think your main inquiry at present is answered by the conclusion that Jamaica is under the obligations of the Convention subject to the reservations made by the United Kingdom."

passing judgement upon the status of reservations formulated by the predecessor State;[87]

(b) Some newly independent States have expressly maintained the reservations formulated by the predecessor State;[88]

(c) In other cases, the newly independent State has essentially reformulated the same reservations made by the predecessor State;[89]

(d) There have been cases in which the newly independent State has maintained the reservations formulated by the predecessor State while adding new reservations;[90]

(e) There have also been cases in which the newly independent State has "reworked" reservations made by the predecessor State;[91]

(f) In a few cases, the newly independent State has withdrawn the predecessor State's reservations while formulating new reservations;[92]

(g) Lastly, there have been cases in which the newly independent State has formulated new reservations while maintaining those of the predecessor State.[93]

(b) Successor States other than newly independent States

56. In these cases of succession, in particular those of the States that emerged from the former Yugoslavia and Czechoslovakia, the reservations of the predecessor State have been maintained.

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[87] See, for example, *Multilateral treaties deposited with the Secretary-General*, op. cit., vol. I, p. 136 (Solomon Islands). The Solomon Islands succeeded to the International Convention on the Elimination of All Forms of Racial Discrimination without making any mention of the reservations made by the predecessor State (the United Kingdom), which are not reproduced in relation to the Solomon Islands. The same remark may be made in relation to the succession of Senegal and Tunisia to the Convention relating to the Status of Refugees; ibid., vol. I, p. 376.

[88] Ibid., vol. I, p. 379 and p. 389, note 18 (Cyprus); p. 631 (Fiji); p. 390, note 21 (Gambia); and vol. II, p. 84 (Solomon Islands).

[89] Ibid., vol. I, pp. 138-139 (Fiji) and pp. 394-395 (Kiribati).

[90] Ibid., vol. I, p. 398, note 12 (Lesotho).

[91] Ibid., vol. I, pp. 380 and 393 (Fiji).

[92] Ibid., vol. I, p. 396 and p. 398, note 14 (Zambia).

[93] Ibid., vol. I, p. 393 and p. 398, note 7 (Botswana).

57. It should be noted, in this regard, that the Czech Republic,[94] Slovakia,[95] the Federal Republic of Yugoslavia[96] and, subsequently, Montenegro[97] formulated general declarations whereby these successor States reiterated the reservations of the predecessor State.

58. In addition, in some cases the predecessor State's reservations have been expressly confirmed[98] or reformulated[99] by the successor State in relation to a particular treaty.

59. In the case of the Republic of Yemen [united], there was also a repetition of reservations by the successor State. In a letter dated 19 May 1990 addressed to the Secretary-General, the Ministers for Foreign Affairs of the Yemen Arab Republic and the People's Democratic Republic of Yemen communicated the following:

> "As concerns the treaties concluded prior to their union by the Yemen Arab Republic or the People's Democratic Republic of Yemen, the Republic of Yemen (as now united) is accordingly to be considered as a party to those treaties as from the date when one of these States first became a party to those treaties. Accordingly the tables showing the status of treaties will now indicate under the designation 'Yemen' the date of the formalities (signatures, ratifications, accessions, declarations and reservations, etc.) effected by the State which first became a party, those eventually effected by the other being described in a footnote."[100]

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[94] Ibid., vol. I, p. XII. In a letter dated 16 February 1993 addressed to the Secretary-General and accompanied by a list of multilateral treaties deposited with the latter, the Czech Republic stated, among other things: "In conformity with the valid principles of international law and to the extent defined by it, the Czech Republic, as a successor State to the Czech and Slovak Federal Republic, considers itself bound, as of 1 January 1993, i.e., the date of the dissolution of the Czech and Slovak Federal Republic, by multilateral international treaties to which the Czech and Slovak Federal Republic was a party on that date, including reservations and declarations to their provisions made earlier by the Czech and Slovak Federal Republic [...]".

[95] Ibid., vol. I, p. XXIX. Slovakia declared, in a letter dated 19 May 1993 addressed to the Secretary-General and accompanied by a list of multilateral treaties deposited with the latter: "In accordance with the relevant principles and rules of international law and to the extent defined by it, the Slovak Republic, as a successor State, born from the dissolution of the Czech and Slovak Federal Republic, considers itself bound, as of 1 January 1993, i.e., the date on which the Slovak Republic assumed responsibility for its international relations, by multilateral treaties to which the Czech and Slovak Federal Republic was a party as of 31 December 1992, including reservations and declarations made earlier by Czechoslovakia, as well as objections by Czechoslovakia to reservations formulated by other treaty-parties [...]".

[96] Ibid., vol. I, pp. XXXI-XXXII, note 1. The notification of 8 March 2001 addressed to the Secretary-General by the Federal Republic of Yugoslavia contained the following indication: "[...] The Government of the Federal Republic of Yugoslavia maintains the signatures, reservations, declarations and objections made by the Socialist Federal Republic of Yugoslavia to the treaties listed in the attached annex 1, prior to the date on which the Federal Republic of Yugoslavia assumed responsibility for its international relations [...]".

[97] See http://treaties.un.org/Pages/HistoricalInfo.aspx?#"Montenegro. In a letter dated 10 October 2006, accompanied by a list of treaties deposited with the Secretary-General, Montenegro indicated that it would maintain "[...] the reservations, declarations and objections made by Serbia and Montenegro" in relation to the treaties concerned.

[98] *Multilateral treaties deposited with the Secretary-General*, op. cit., vol. I, p. 448 (Serbia and Montenegro).

[99] Ibid., vol. I, p. 340, note 39 (Slovenia, which withdrew this reservation in 2004).

[100] Ibid., vol. I, p. XXXI.

60. Lastly, there is the case of the other successors to the former Yugoslavia (apart from the Federal Republic of Yugoslavia), which appear in the list of successor States to various treaties deposited with the Secretary-General with the indication, in footnotes, of reservations formulated by the former Yugoslavia.[101]

2. Objections to reservations

(a) Successor States that are newly independent States

61. At the outset, mention should be made of a number of cases in which a newly independent State confirmed, in notifying its succession, the objections made by the predecessor State to reservations formulated by States parties to the treaty.[102]

62. There have also been a few cases in which objections formulated by the predecessor State have been withdrawn and, at the same time, new objections have been formulated.[103]

(b) Successor States other than newly independent States

63. In the case of the successor States to Czechoslovakia, objections made by the predecessor State to reservations formulated by other States parties were explicitly maintained by Slovakia.[104] Similarly, the Federal Republic of Yugoslavia stated that it maintained the objections made by the former Yugoslavia,[105] and Montenegro stated that it maintained the objections made by Serbia and Montenegro.[106]

B. Practice in relation to treaties deposited with other depositaries

64. The practice concerning these other treaties provides little guidance on the question of reservations and objections to reservations in the context of succession of States. The few elements that have been identified do not tend to contradict the lessons that can be drawn from the practice in relation to treaties for which the United Nations Secretary-General serves as depositary.

65. As to the status of reservations formulated by the predecessor State, it should first be noted that the Czech Republic and Slovakia transmitted to a number of depositaries notifications of succession similar to those transmitted to the United Nations Secretary-General and providing for the maintenance of reservations formulated by the predecessor State.[107] Neither the depositaries in question nor the other States parties to the treaties concerned raised any objections to this practice.

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[101] See, for example, vol. I, p. 335, note 3; p. 448, note 2; and p. 454, note 3; also vol. II, p. 114, note 2; p. 306, note 1; and pp. 370-371, note 2.

[102] Ibid., vol. I, p. 95 (Malta), which repeated, upon succession, some objections formulated by the United Kingdom; vol. I, p. 97 (Tonga), which indicated that it "adopted" the objections made by the United Kingdom respecting the reservations and statements made by Egypt; vol. II, pp. 292 and 298 (Fiji); and vol. II, p. 293 and p. 306, note 6 (Tonga).

[103] Ibid., vol. II, p. 298 (Fiji) and p. 299 (Tonga).

[104] See note 95 above.

[105] See note 96 above.

[106] See note 97 above.

[107] See Václav Mikulka, "The dissolution of Czechoslovakia and succession in respect of treaties", in Mojmir Mrak (ed.), *Succession of States*, The Hague/London/Boston, M. Nijhoff, 1999, pp. 111-112.

66. On the issue of whether or not a successor State should be presumed to maintain reservations made by the predecessor State, the reply of the Universal Postal Union to the Special Rapporteur's questionnaire is worth mentioning.[108] That organization's practice is to consider that valid reservations applicable to a member State are automatically transferred to the successor State; the same is true in the case of States that have become independent by separating from a member State.

67. The Council of Europe applied the same presumption with respect to Montenegro. In a letter dated 28 June 2006 addressed to the Minister for Foreign Affairs of Montenegro, the Director General of Legal Affairs of the Council of Europe indicated that, in accordance with article 20 of the Vienna Convention of 1978, the Republic of Montenegro was considered "as maintaining these reservations and declarations because the Republic of Montenegro's declaration of succession does not express a contrary intention in that respect".[109] That letter also included a list of reservations and declarations that had been revised in places to remove references to the Republic of Serbia. By a letter dated 13 October 2006, the Minister for Foreign Affairs of Montenegro communicated his agreement on the wording of those reservations and declarations, as adapted by the depositary.

68. The practice followed by Switzerland as depositary of a number of multilateral treaties likewise does not reveal any fundamental contradiction with that of the Secretary-General of the United Nations. It is true that Switzerland had initially applied, to a successor State that made no reference to the status of the predecessor State's reservations, the presumption that such reservations were not maintained. Today, however, Switzerland no longer applies any presumption, as its practice is to invite the successor State to communicate its intentions as to whether or not it is maintaining reservations formulated by the predecessor State.[110]

69. Lastly, on the capacity of a successor State to formulate new reservations, it should be noted that the Council of Europe, in its letter to Montenegro of 28 June 2006,[111] took the position that that State was not entitled to make new reservations to treaties to which it had notified its succession.[112] This position seems to be consistent with the rule of *ipso jure* succession to treaties, as set out in the Vienna Convention of 1978 for cases involving the uniting or separation of States.

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[108] See note 4 above.

[109] JJ55/2006, PJD/EC.

[110] See the letter dated 3 May 1996 from the Directorate of Public International Law addressed to an individual, describing the practice of Switzerland as depositary State for the Conventions of 12 August 1949 for the protection of victims of war, in relation to the succession of States to treaties; reproduced in *Revue suisse de droit international et de droit européen*, 1997, 7th year, pp. 683-685, especially p. 684. This approach was confirmed in an opinion given on 6 February 2007 by the Directorate of Public International Law of the Federal Department of Foreign Affairs, entitled "Pratique de la Suisse en tant qu'Etat dépositaire. Réserves aux traités dans le contexte de la succession d'Etats", reproduced in *Jurisprudence des autorités administratives de la Confédération (JAAC)*, 5 December 2007 edition, pp. 328-330, especially p. 330 (available at www.bk.admin.ch/dokumentation/02574/02600/index.html?lang=fr).

[111] See note 109 above.

[112] "[T]he Republic of Montenegro does not have the possibility, at this stage, to make new reservations to the treaties already ratified".

Annex

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